88-1584

Supreme Court, U.S.
FILED
MAR 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. A-699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. SIZEMORE, D.D.S.,
Petitioner,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

DO THE DICTATES OF DUE PROCESS REQUIRE SOME QUANTUM OF EVIDENCE GREATER THAN SELF-CONTRADICTORY TESTIMONY AS EVIDENTIARY SUPPORT OF A MEDICAL DISCIPLINARY BOARD'S DECISION? [Due Process Requirements in Adminstrative Proceedings, Substantial Evidence, Arbitrary and Capricious].

QUESTION 2

MAY SELF-CONTRADICTORY EXPERT TESTIMONY CONSTITUTE SUBSTANTIAL EVIDENCE IN A MEDICAL DISCIPLINARY PROCEEDING WHERE THE EXPERT HAS NOT EXAMINED THE PATIENT(S) WHOSE TREATMENT HAS BEEN QUESTIONED? [Vagueness, due process, fair notice].

QUESTION 3

IS THE DENIAL OF THE RIGHT OF JURY TRIAL TO DENTAL DEFENDANTS IN STATE DISCIPLINARY PROCEEDINGS WHILE ATTORNEYS ARE ACCORDED SUCH RIGHTS RATIONALLY RELATED TO ANY STATE INTEREST?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioner, Charles W. Sizemore, D.D.S., files this Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Texas which reversed the holding, en banc, of the Court of Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, Texas, affirmed the holding of the 95th Judicial District Court of Dallas County, Texas and upheld an administrative Disciplinary Order suspending Dr. Sizemore from the

practice of dentistry for a period of one-hundred twenty (120) days.

In support of the Petition, it is respectfully shown to the Court as follows:

OPINIONS BELOW

A copy of the Order of the Supreme Court of Texas overruling Charles W. Sizemore's Petition for Rehearing is attached as Appendix A. The original Complaint of the Texas State Board of Dental Examiners is attached as Appendix B. A copy of the Administrative Opinion of the Texas State Board of Dental Examiners purporting to impose a five-year suspension of Dr. Sizemore's license with all but one-hundred twenty (120) days of that period probated is attached as Appendix C. A copy of the Memorandum Opinion of the 95th Judicial District Court of Dallas County, Texas is attached as Appendix D. A copy of the Judgment of the 95th Judicial District Court of Dallas County, Texas is attached as Appendix E. A copy of the Reformed Judgment of the 95th Judicial District Court of Dallas County, Texas is attached as Appendix F. A copy of the En Banc Opinion of the Court of Appeals for the Fifth Supreme Judicial District at Dallas, Texas is attached as Exhibit G. A copy of the Judgment of the Court of Appeals for the Fifth Supreme Judicial District at Dallas, Texas is attached as Exhibit H. A copy of the Dissenting Opinion by Justice McCraw of the Court of Appeals for the Fifth Supreme Judicial District at Dallas, Texas is attached as Exhibit I. A copy of the Judgment of the Court of Appeals for the Fifth Supreme Judicial District at Dallas, Texas is attached as Exhibit J. A copy of the En Banc Order of the Court of Appeals for the Fifth Supreme Judicial District at

Dallas, Texas is attached as Exhibit K. A copy of the Judgment of the Supreme Court of Texas is attached as Exhibit L. The opinion of the Supreme Court of Texas was officially reported. A copy of the full original text of the Texas Supreme Court Opinion is attached as Appendix M.

JURISDICTION

This is a civil appeal from the highest court of a state. Charles W. Sizemore's Petition for Rehearing to the Supreme Court of Texas was overruled on the 23rd day of November, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED

The suspension of Sizemore's license was predicated on Tex. Rev. Civ. Stat. Ann., Art. 4549, Section 2(c), 2(j), 4(b); Tex. Rev. Civ. Stat. Ann., Art. 4551(h); and Tex. Rev. Civ. Stat. Ann., Art. 6252-13(a), Section 19.

SUMMARY OF THE CASE

In the course of his dental practice, Charles W. Sizemore occasionally dispensed pain-killing drugs prior to performing major dental procedures. Sizemore held a license to dispense such drugs issued by the state. In the course of prescribing these drugs, Sizemore encountered several patients who did not respond immediately to treatment, had difficulty making appointments, and did not respond to treatment as anticipated.

Sizemore's routine procedure in handling these patients involved prescribing the standard dose of pain killer necessary to carry the patient to the next office visit along with antibiotics to bring the patient's infection under control.

On the 12th day of December, 1983, Dan M. Evans, a member of the Texas State Board of Dental Examiners filed Complaint No. 1983-34 charging Sizemore with violations of Tex. Rev. Civ. Stat. Ann., Article 4551(h), Article 4559, and Board Rule No. 382.19.15.004 (pertaining to drug prescription record keeping).

Sizemore's prescriptions caught the attention of Board investigators, who attempted to develop evidence proving Sizemore had over-prescribed controlled substances to patients Danny McKay, Carol Box, Roxanne Sabato, and Kenneth Cook. The prescriptions complained of were all "standard doses" of the drug, Percodan.

At the administrative hearing, held in the old Shamrock Hotel, in Houston, Texas, the State Board of Dental Examiners introduced direct testimony from its expert, Dr. Arthur H. Jeske, a dentist and trained pharmacologist, which questioned the frequency of Sizemore's prescription of pain-killing drugs and his duration of treatment.

Sizemore's alleged over-prescription of controlled substances was the prohibited conduct. The Board filed, tried, and disposed of the Disciplinary Complaint under the assumption that the statutes allegedly violated [Art. 4549, Section 2(c), 2(j), 4(b), and Art. 4551(h)] did not require the Board to prove intent or knowledge in order to sustain disciplinary sanctions.

Sizemore's specific written records of the patients in question, with the exception of Danny McKay, indicate some form of serious infection present in the patient which prevented any immediate dental procedures and had to be treated with antibiotics.

The Board's own expert (Jeske) admitted that prescription of antibiotics to control infection, in conjunction

with pain-killers was an acceptable course of treatment for the patients (Box, Sabato, and Cook). Although Danny McKay suffered from temporal mandibular joint pain, Jeske conceded that Sizemore's prescription of Percodan, or other pain killers, did not violate acceptable standards of dental practice.

The Board began and rested its case with this testimony. Presumably, the Board's investigator and the four patients could add nothing and were not called. Jeske frankly admitted he was no expert in the field of pathogenic microbiology and, therefore, could not question Sizemore's treatment of the patients' infections with antibiotics. (See Page 29, LL 14-25 and P. 30, L 1 of "Transcript of Proceedings"). Jeske conceded that Sizemore followed standard dental practice in treating the patients' infection, and attempting to bring them under control prior to performing any procedures. (See P. 31, LL 1-25 of "Transcript of Proceedings").

Ultimately, the Board found Dr. Sizemore guilty on three of the four counts of its Complaint. After an unsuccessful Motion for Rehearing at the administrative level, Sizemore appealed to the District Courts of the county of his residence pursuant to the Tex. Rev. Civ. Stat. Ann., Article 6252-13(a), Section 19. The 95th Judicial District Court of Dallas County, Texas entered an order sustaining the Board's Disciplinary Order in all of its particulars.

Thereafter, Sizemore filed an appeal bond and proceeded before the Court of Appeals for the Fifth Supreme Judicial District at Dallas, Texas.

The Dallas Court of Appeals reversed the District Court and the Board's Disciplinary Order, in an En Banc

Opinion, based on a lack of "substantial evidence" proving Sizemore's violation of "good dental practice." The Court of Appeals then denied the Board's Motion for Rehearing.

However, the Supreme Court of Texas granted a Writ of Error ". . . on the sole issue . . ." of substantial evidence. The Texas Supreme Court then reversed the En Banc Opinion of the Dallas Court of Appeals finding, expressly, that the Board's Disciplinary Order was supported by substantial evidence.

Sizemore then filed a Petition for Rehearing which was overruled on November 23, 1988. Justices of the Texas Supreme Court freely admitted the self-contradictory nature of the Board expert's testimony but insisted that the Board, as a fact finder, should be free to "pick and choose" its evidence in any manner it chose. Sizemore now brings his case to the nation's highest court in an effort to determine what minimum level of "substantial evidence" is necessary to satisfy due process in a disciplinary proceeding.

STATEMENT OF THE CASE

QUESTION 1

DO THE DICTATES OF DUE PROCESS REQUIRE SOME QUANTUM OF EVIDENCE GREATER THAN SELF-CONTRADICTORY TESTIMONY AS EVIDENTIARY SUPPORT OF A MEDICAL DISCIPLINARY BOARD'S DECISION? [Due Process Requirements in Administrative Proceedings, Substantial Evidence, Arbitrary and Capricious].

Although reviewing Courts are reluctant to disturb findings of administrative bodies, there are limits to what

the dictates of due process will allow. This is so, not only in the state context but, also, under the Fifth Amendment to the United States Constitution and the due process clause. It is true in the Federal Courts and agencies as well as those of the states. This argument addresses the specific issue of what minimum quantum of evidence, the state must produce to meet the requirements of due process and, at the same time, uphold an administrative disciplinary order depriving a citizen of his right to practice his *licensed* profession. As noted by the Texas Supreme Court, in the opinion appealed from (Appendix M, PP. 59a, 60a), the Texas Supreme Court rejected the due process limitations which the Court of Appeals imposed on the "substantial evidence" rule and stated—

> ". . . We are presented solely with the question of whether substantial evidence exists in the record to support the Board's action. *Texas Health Facilities Comm. v. Charter Medical-Dallas, Inc.*, 665 S.W. 2d 446, 452 (Tex., 1984); *Imperial American Resources Fund, Inc. v. Railroad Comm.*, 557 S.W.2d 280, 286 (Tex., 1977). Under this test, we find that some reasonable basis exists for the Board's action. *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex., 1966).

See Tex. Rev. Civ. Stat. Ann., Article 6252-19(e).

The State Opinion ignores the dictates of due process which must be met prior to any finding of substantial evidence. Yet, the constitutional limits imposed by that clause on administrative proceedings are binding on the State of Texas and its Board and can not be so lightly ignored. Other than Sizemore's own admissions that his dental practice was, perhaps, ". . . not perfect . . ." with

respect to Danny McKay, the sole support for the imposition of license suspension is the testimony of Jeske the deficiencies in which were described by the En Banc Opinion of the Court of Appeals, as follows:

> "The Board's only witness was Dr. Arthur H. Jeske. His testimony related to the propriety of Appellant's drug prescriptions. He based his testimony upon his review of Appellant's treatment records. *He neither interviewed nor examined the patients themselves. The patients were not called.* Neither did the Board's investigator testify. Patients Schultz, Sabato and Cook suffered from oral infections, which Appellant treated with antibiotics. Patient McKay suffered from an ailment associated with the temporal mandibular joint in his lower jaw, known as TMJ.
>
> "On direct examination, Dr. Jeske expressed his expert opinion that Appellant's prescriptions exceeded the 'generally-accepted dosages' for dental treatment. *But on cross-examination, he made several significant qualifications of his testimony.* He also testified that, in his opinion, another course of treatment not involving analgesics would have been more suitable for patient McKay. He further testified *by way of conclusion* that the course of medication given 'could promote or further addiction;' there was no testimony that it *would* do so. Neither did he give any specifics; he failed to state what dosages, if any, would have been the maximum and safe proper amounts under the condition shown."

See Appendix G, PP. 30a and 31a.

The Court of Appeals' reference to the ". . . several significant qualifications . . ." of Jeske's testimony was extremely charitable. On cross-examination, Jeske retracted the following points of his direct testimony:

1. Jeske was not an expert in pathogenic microbiology; therefore, he could not question Sizemore's treatment of patients' infections with the antibiotic dosages indicated. (Transcript of Proceedings, P. 29, LL 14-25 and P. 30, L 1).

2. Jeske could not fault Sizemore for having failed to refer the patients to an oral surgeon for treatment of the infections when they did not respond to the antibiotics Sizemore prescribed. (Transcript of Proceedings, P. 31, LL 1-25).

3. The infections had to be effectively treated by Sizemore and brought under control before he attempted major dental procedures. (Transcript of Proceedings, P. 35, LL 21-23).

4. Jeske could not testify, within "reasonable medical certainty" that Kenneth Cook, Carol Box, and Roxanne Sabato did not have infections when they received antibiotics and pain-killing drugs. (Transcript of Proceedings, P. 36, LL 1-6).

5. Jeske conceded it was not bad dentistry to continue to treat the patients involved with antibiotics over a long period of time when the infections failed to respond. (Transcript of Proceedings, P. 37, LL 2-25; P. 38, LL 1-21).

6. Sizemore's dental records of the patients involved did not indicate "poor medical practice in the prescription of the antibiotic. . . ." (Transcript of Proceedings, P. 40, LL 2-7).

7. Sizemore's prescription of Percodan to McKay for his temporal mandibular joint condition did not violate acceptable standards of dental practice "within a reasonable medical certainty. . . ." (Transcript of Proceedings, P. 43, LL 1-25 and P. 44, LL 1-23).

8. Sizemore should have treated the patient McKay and there was no point at which the treatment should

have been discontinued. (Transcript of Proceedings, P. 45, LL 19-25).

9. Sizemore had no responsibility to monitor his patients to make sure they took their antibiotics while they received the analgesics to relieve the pain of infection. (Transcript of Proceedings, P. 47, LL 5-23).

10. Continued prescription of analgesics, in standard doses, over a long period of time to alleviate pain from persistent infections not responsive to treatment did not violate good dental practice within a ". . . reasonable medical certainty. . . ." (Transcript of Proceedings, P. 48, LL 15-25; and P. 49, LL 1-4).

11. Sizemore's entire course of treatment may have been within accepted standards of the dental community even under Jeske's objective analysis. (Transcript of Proceedings, P. 50, LL 5-25).

12. Jeske could not testify within a reasonable medical certainty that Percodan had actually been overprescribed for any of Sizemore's patients. (Transcript of Proceedings, P. 62, LL 16-25; P. 63, LL 1-25).

The Supreme Court of Texas Opinion would allow the Board's hearing examiners to pick and choose the testimony supporting its disciplinary order oblivious to the diametrically opposite conclusions of the same witness drawn on direct and cross-examination and the credibility of such opinions in light thereof.

In doing so, the Texas Supreme Court abandoned its constitutional duty to ensure that the practice of dentistry in the state is regulated in a manner strictly conforming with the dictates of due process.

As the Dallas Court of Appeals observed—

> "The practice of dentistry is a lawful profession . . . The right or privilege to engage in it, once it is lawfully acquired, *is a right or privilege protected by the Due Process clauses of the state and federal constitutions*. . . .
>
> The right to practice a profession has been called a property right. But it is more . . . There is moreover a prestige and good name . . . To cancel a professional license is to take the capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him poor indeed . . ." See Appendix G at P. 33a. Citing *Francisco v. Board of Dental Examiners*, 149 S.W.2d 619, 622 (Tex. Civ. App.—Austin, 1941, Writ Ref'd.)

The Dallas Court of Appeals imposed a due process test ultimately rejected by the Texas Supreme Court—that Sizemore's dental license could be revoked or suspended—

> "Only upon proof of conduct injurious to the public welfare. . . ."

Appendix G at P. 33a.

While noting that the applicable statutes and rules did not expressly provide for such a limitation, the Dallas Court held—

> ". . . We must construe them as implying such a requirement, else they offend the Constitution. . . ."

Appendix G at P. 33a.

The revocation of professional licenses is a serious business. It should be supported by something more than the self-conflicting testimony of a dental expert who has never examined the patients at issue.

This Court is no stranger to such litigation. In *Richardson v. Perales*, 91 S. Ct. 1420 (1971) a written report by a licensed physician who had not examined the patient-social security applicant was ultimately held admissible by a majority of this Court. However, Mr. Justice Blackmun's Opinion which addresses the admissibility of the so-called "administrative medical expert" appointed by the administrative hearing examiner observes—

> Dr. Leavitt was called by the hearing examiner as an independent medical adviser, that is, as an expert who does not examine the claimant but who hears and reviews the medical evidence and who may offer an opinion.
>
> "This particular record discloses that Dr. Leavitt explained the technique and significance of electromyography. He did offer his own opinion on the claimant's condition. That opinion, did not differ from the medical reports. Dr. Leavitt did not vouch for the accuracy of the facts assumed in the reports. No one understood otherwise. We see nothing unconstitutional or improper in the medical adviser concept and in the presence of Dr. Leavitt in this administrative hearing."

See *Richardson* at PP. 1427 and 1431.

What this Court is now faced with, as a result of this appeal, is the issue of whether the self-conflicting testimony of a non-examining physician (dentist) may constitute substantial evidence consistent with due process. Unlike *Richardson*, supra, there is no ". . . non-conflicting

additional expert opinion . . ." from examining physicians which can serve as additional evidentary support. Clearly, the dissent would not have accepted such a holding. Justice Blackmun's majority opinion lends no support for it either. According to Justice Blackmun's majority, this Court has defined substantial evidence as evidence constituting—

> ". . . More than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> "The Court has adhered to that definition in varying statutory situations."

See *Richardson* at P. 1427.

Petitioner emphatically suggests that the state Courts are not free to subject Petitioner and those similarly situated to license revocation proceedings on a quantum of evidence less than that meeting this Court's definition expressed above. As noted by the dissent in *Richardson* at P. 1433, Federal Courts are loathe to slavishly follow an administrative body's evidentiary findings. Such findings may be rejected in the Seventh Circuit under exceptional circumstances. *N.L.R.B. v. Laborers' Internatl. Union,* 810 F.2d 665 (C.A. 7, 1987) at P. 670. The whole record must be analyzed by the reviewing Court, including evidence contravening the agency's determination. *Turcios v. I.N.S.,* 821 F.2d 1396 (C.A. 9, 1987) at P. 1398. While a mere drawing by the agency of two inconsistent conclusions from the same testimony is not enough to overturn a substantial evidence finding the conclusions must be reasonably drawn. *Illinois Central Rail Co. v. Norfolk & Western Ry. Co.,* 87 S. Ct. 255 (1966) at P. 262. In reviewing administrative fact find-

ings to determine whether they are supported by substantial evidence, the reviewing Court must look to the record in its entirety, "including the body of evidence opposed to the agency's view." *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529 (C.A. 11, 1985) at P. 1539. Citing *Universal Camera v. N.L.R.B.*, 71 S. Ct. 456 at P. 465. Administrative decisions which are not supported by "substantial evidence" are "arbitrary and capricious" and need not be followed. *City of Pompano Beach* at P. 1538. A reviewing Federal Court should not ". . . blindly follow . . ." the administrative fact finder's determination since the reviewing Court bears the responsibility to determine whether there is substantial evidence to support the decision. *Willbanks v. Secy. of Health and Human Servs.*, 847 F.2d 301 (C.A. 6, 1988) at P. 303. In determining whether an administrative decision is "arbitrary and capricious" a reviewing Court must apply appropriate standards to determine whether ". . . constitutional requirements . . ." have been met. *Motor and Equipment Mfrs. Ass'n., Inc. v. E.P.A*, 627 F.2d 1095 (C.A. D.C., 1979) at P. 1105. Conclusions of the administrative fact finder which are—

> ". . . So out of touch with reality revealed by the whole record as to be arbitrary and capricious . . ."

need not be followed. *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (C.A. 6, 1986) at P. 1187. It is the function of the reviewing Court to determine the ". . . parameters of rationality . . ." binding on the particular agency. *The Conservation Law Found. of New England v. Clark*, 590 F.Supp. 1467 (D.C. Mass., 1984) at P. 1483.

The broad reach of the above opinions merely highlights the restrictions on the regulatory process worked

by the proper application of the due process clause of the Fifth Amendment. In the present case, reliance on Jeske's conflicting statements is not "reasonable." The Board's decision suspending Sizemore's license is, therefore, "arbitrary and capricious" and does not meet constitutional muster. The Texas Supreme Court cited *Semeler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 611 (1935) as supposed support for the Board's unbridled regulatory discretion.

In an analogous case involving self-contradictory testimony allegedly supporting a federal administrative fact finding, a panel of the Sixth Circuit, in reversing for lack of substantial evidence held—

> "In examining Foote's testimony, and his denial that he offered a number of employees a waiver of initiation fees if they signed union authorization cards, the A.L.J. conceded that Foote's oral evidence at the hearing differed from his version of events given in the affidavit which he had given to the General Counsel only a short time after the events occurred.
>
> "Foote's testimony at the hearing above outlined was not only inconsistent with his affidavit, it was also inconsistent, as will be seen, with that of a number of employees called by the General Counsel and by the union.
>
> "We find the A.L.J. credibility determination under the unusual facts of this case to be unreasonable. To attribute Foote's version of his discussions about initiation fees and waiver of fees as truthful and to discredit entirely on a dubious basis, versions of four or five other employees, some of whom supported the union, in the face of Foote's admitted discrepancies in other material respects is simply contrary to good sense."

Krispy Kreme Doughnut Corp. v. N.L.R.B., 732 F.2d 1288 (C.A. 6, 1984) at PP. 1290, 1291, and 1293. The *unusual facts* in *Krispy Kreme* are present here—the key witness on whose testimony the administrative finding is based contradicted himself so thoroughly that his testimony can not be the basis for a finding of substantial evidence. Both the same fact and the same principle are applicable here.

As noted by the Court of Appeals below, professional misconduct proceedings are quasi-criminal in nature. *In Re: Ruffalo*, 390 U.S. 544 (1968) (attorney disbarment). Evidence of conduct ". . . injurious to the public welfare . . ." must be substantial in order to support disciplinary action. Sizemore could not be punished under Article 4551(h) unless his prescriptions acted to ". . . promote and further . . ." addiction. Since all opiate-derived analgesics, such as Percodan, are addictive in nature, the prescription of such drugs is prohibited save and except for dispensation for the ". . . therapeutic benefit . . ." of a patient determined by the treating physician (in this case, dentist) under—

> ". . . Continually evolving and changing non-statutory standards fashioned to meet contemporary norms . . ."

Rathle v. Grote, 584 F.Supp. 1128 (D.C. M.D. Ala., 1984) at P. 1132. Given Jeske's "qualifications" of his testimony on cross-examination, there is no evidentiary support for the proposition that Sizemore's prescriptions had no therapeutic benefit. The exercise of independent medical judgment by the medical practitioner is not so easily trifled with. Here, as in *United States v. Vuitch*, 91 S. Ct. 1294 (1971) the Board has the burden to plead

and prove that Sizemore's prescriptions were not necessary or of therapeutic benefit to the patient. See *Vuitch* at P. 1299. Thus, neither the disciplinary order nor the findings supporting it may survive.

The Board, the Trial Court, and the Supreme Court of Texas somehow lost sight of the principle that—

> "In making a medical judgment concerning the right treatment for an individual patient, *physicians require a certain latitude of available options. What constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances.*

United States v. Collier, 478 F.2d 268 (C.A. 5, 1973) at P. 272. Citing *Doe v. Bolton,* 93 S. Ct. 739 (1973) at P. 747 and *Linder v. United States,* 45 S. Ct. 446 (1925) at P. 449. In properly applying this 'rule of latitude' engrafted on the regulation of the practice of medicine (and dentistry) the Dallas Court of Appeals properly observed—

> "The qualifications of expert witness Jeske are acknowledged as impressive. However, his testimony was all subjective; he repeatedly attached the limiting phrase "in my opinion" to his testimony; he testified as to the manner in which he personally would have treated the patients. The fact that these patients did not receive the treatment that a renowned expert would have given proves nothing; *the substantial evidence rule was not satisfied thereby. Discipline may not be imposed for failure to follow the highest standards of the profession;* such test is no test at all for the reason that instances can be developed whereby any licensee could be held guilty of misconduct. *Discipline is not imposed for the*

failure to achieve high standards; it is imposed for the failure to observe minimum standards.

"Particularly in view of the fact that none of the patients was examined or interviewed, the testimony of expert witness, Dr. Jeske, in order to be actionable, had to declare that no reasonably competent practitioner similarly situated would have treated these patients in the manner shown by Appellant's records. Lacking such testimony, there was no substantial evidence of intolerable conduct. At most, there was no more than substantial evidence of the failure to observe high standards. Such evidence failed to show actionable misconduct.

The expert further acknowledged, both on direct and cross-examination that he was giving only his opinion and that his opinion must be qualified by the fact that he never saw the patients. A dichotomy as to whether the patients received treatment of optimal quality does not meet the test. The substantial evidence rule is not satisfied without proof of professional misconduct clearly rising to the level of negligence, incompetence or wilfull misconduct."

Appendix G at PP. 43a and 44a, Note 5.

Instead of properly applying the principles of *Linder, Doe,* and *Collier,* which would allow the practicing physician (or dentist) latitude in making a professional judgment to dispense drugs, the Board and Supreme Court of Texas would suspend his license for failing to comply with the theoretical standard, concocted after the fact, by a non-examining physician (or dentist). The minimum standard of proof necessary to meet the substantial evidence test may not be stripped so bare. As a result of the decision below, Texas Courts will now enforce administrative revocations or suspensions of professional

licenses in the absence of any proof of knowledge or intent—in effect, a strict liability situation which infringes on the physician's (or dentist's) relationship with his patients and freedom to practice guaranteed by *Doe, Vuitch, Linder,* and other decisions of this Court. The Dallas Court of Appeals correctly interpreted the drug-prescription statute (Article 4551(h)) to require a finding of knowledge and intent prior to the imposition of disciplinary sanctions. Appendix G, P. 33a. In line with the admonition in *Linder* that—

> ". . . A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. . . ."

See *Linder at* P. 449. See also *State Bd. of Dental Examiners v. Friedman,* 666 S.W.2d 363 (Tex. App., 14 Dist., 1984) (requiring finding of knowledge and intent prior to imposition of discipline).

The Texas State Courts have historically followed the same tests as those applied by the Federal Circuits in determining sufficiency of evidence in the administrative context. *Incredible, perjured, or unreasonable testimony* has been rejected. *Trapp v. Shell Oil Co.,* 198 S.W.2d 424.

The decision of the Board and the Texas Supreme Court violated the due process clause of the Fifth Amendment binding on the state under the Fourteenth Amendment. The decision of the Board lacked the minimum quantity of probative evidence necessary to satisfy the due process clause. The opinion of the Supreme Court of Texas should be reversed and the opinion of the Court of Appeals should be reinstated.

QUESTION 2

MAY SELF CONTRADICTORY EXPERT TESTIMONY CONSTITUTE SUBSTANTIAL EVIDENCE IN A MEDICAL DISCIPLINARY PROCEEDING WHERE THE EXPERT HAS NOT EXAMINED THE PATIENT(S) WHOSE TREATMENT HAS BEEN QUESTIONED? [Vagueness, due process, fair notice].

The fair notice requirements attendant to the due process clause prohibit vagueness in the disciplinary standards to be followed by a state agency's regulating health professionals. Without fair notice of what conduct is proscribed, a constitutional vice arises which operates as an—

> "Injustice to the accused and placing him on trial for an offense, as to the nature of which he is given no fair warning. . . ."

See *American Communications Assn. v. Douds,* 70 S. Ct. 674 (1950) at P. 691.

The Board's expert freely condemned Sizemore on direct at the behest of the Board employing him. His condemnations, however, were all subjective—made after the fact and without the benefit of an examination of the patients' condition. Sizemore, on the other hand, lacked the benefit of hindsight. He freely exercised the discretion of his professional judgment as he was licensed to do by the state. Absent from the record is any indication that Sizemore treated the patients in any manner other than in "good faith." See *Vuitch* at P. 1301.

While, without question, the state has broad power to establish and enforce standards of conduct within its

borders relative to the health of everyone there, such power is not unbridled but, instead, is subject to constitutional restraint. See *Rathle* at P. 1132. Citing *N. Dak. St. Bd. of Pharmacy v. Snyder's Drugstores, Inc.*, 94 S. Ct. 407 at P. 412. Where the exercise of any medical discretion is involved in the treatment complained of, the non-examining physician's opinion, standing alone, is simply incompetent to satisfy the dictates of due process. *Richardson,* supra, at P. 1425 and 1431. Where, as here, the medical expert's testimony is based—

". . . Upon assumed facts . . ."

and the physician does not see the patient, his expert testimony and hypotheses are insufficient to constitute substantial evidence or to support the verdict. *Rewis v. United States,* 503 F.2d 1202 (C.A. 5, 1974).

Since this is not a case where the Board may claim that Sizemore's prescriptions and length of treatment unequivocally violated acceptable standards of dental practice, the opinions of its expert, Jeske, are not based on sufficient personal knowledge and, therefore, are incompetent to support the discipline the Board would impose and the Supreme Court of Texas would affirm.

QUESTION 3

IS THE DENIAL OF THE RIGHT OF JURY TRIAL TO DENTAL DEFENDANTS IN STATE DISCIPLINARY PROCEEDINGS WHILE ATTORNEYS ARE ACCORDED SUCH RIGHTS RATIONALLY RELATED TO ANY STATE INTEREST?

While attorneys are granted right to trial by jury in disciplinary proceedings, dentists are denied the same

right in Texas due to the enacted provisions of their health care statute.

The state has failed, throughout this proceeding, to articulate any specific or rational reason for treating dentists differently from attorneys in the disciplinary process. The essence of the equal protection requirement is that the state treat all those similarly situated similarly. See *Zeigler v. Jackson,* 638 F.2d 776 (C.A. 5, 1981). Having failed to show a compelling state interest for this discrepancy and having failed to articulate any rational reason excusing such disparate treatment, the Board and the state have admitted the constitutional infirmity of their practice.

Appellant Sizemore was constitutionally denied his Sixth and Seventh Amendment right to trial by jury. Deprivation of Sizemore's right to trial by jury when other professionals similarly situated have recourse to such rights, violates the equal protection clause of the United States Constitution made binding on the states by the Fourteenth Amendments.

REASONS FOR ALLOWANCE OF THE WRIT

1. Due process requires some quantum of evidence greater than the self-contradictory testimony of the Dental Board's own expert in a medical disciplinary proceeding. Due Process. Minimum Constitutional Standards and Requirements Binding on Administrative Proceedings. Substantial Evidence. Arbitrary and Capricious.

2. The self-contradictory expert testimony of a non-examining physician (dentist) may not constitute substantal evidence in a medical (dental) disciplinary proceeding. Vagueness, Due Process, Fair Notice.

3. Denial of Sizemore's right to trial by jury violates equal protection of the laws. Sixth, Seventh and Fourteenth Amendments.

CONCLUSION

For all of the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOE ALFRED IZEN, JR.
TBC #10443500
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Bellaire, Texas 77401
(713) 668-8815

L. T. BRADT
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(713) 461-5471

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that a copy of the foregoing was sent to Brooks W. Conover, III, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711-2548 by United States mail, postage prepaid, on this the 23rd day of March, 1989.

JOE ALFRED IZEN, JR.

APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

November 23, 1988

Mr. Brooks W. Conover, III
Office of the Attorney General of Texas
Jim Mattox, A. G.
P. O. Box 12548, Capitol Station
Austin TX 78701

Mr. Joe Alfred Izen, Jr.
5222 Spruce Street
Bellaire TX 77401

RE: Case No. C-7369

STYLE: TEXAS STATE BOARD OF DENTAL EXAMINERS

v. CHARLES W. SIZEMORE, D.D.S.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX B

COMPLAINT AND DOCKETED COMPLAINT

NUMBER 1983-34

TEXAS STATE BOARD
OF DENTAL EXAMINERS

v.

CHARLES W. SIZEMORE, D.D.S.
KEYSTONE PARK
13931 NORTH CENTRAL EXPRESSWAY
SUITE 316
DALLAS, DALLAS COUNTY, TEXAS 75243
HOLDER OF TEXAS DENTAL LICENSE NO. 8722

COMPLAINT

BEFORE ME, the undersigned authority, on this day personally appeared Dan M. Evans, hereinafter called Affiant, who, after having been duly sworn by me on his Oath, did depose and say:

I, Dan M. Evans, of Dallas, Dallas County, Texas, an employee of the Texas State Board of Dental Examiners, did in the course of such employment make certain investigations into the professional conduct and acts of one Charles W. Sizemore, D.D.S. of Dallas, Dallas County, Texas, a practicing dentist in the State of Texas and the holder of Texas Dental License No. 8722, previously issued by the Texas State Board of Dental Examiners, duly authorized to grant and issue such license.

As an employee of the Texas State Board of Dental Examiners, I, Dan M. Evans, do hereby present to the

said Secretary-Treasurer of the Texas State Board of Dental Examiners the following Complaint against the said Charles W. Sizemore, D.D.S., hereinafter called RESPONDENT.

I.

On or about September 9, 1981, and thereafter, RESPONDENT had as his dental patient Danny McKay. During the course of treatment, RESPONDENT wrote numerous prescriptions for Schedule II narcotics as reflected by Department of Public Safety records and Pharmacy records. The following is a listing of those prescriptions written and where appropriate, notations from Respondent's dental records indicating dental treatment and prescriptions:

Date	*Narcotic*	*Respondent's Dental Record*
9/10/81	Percodan x 20	No entry for treatment or prescription
10/ 9/81	Percodan x 20	No entry for treatment or prescription
10/28/81	Percodan x 20	No entry for treatment performed or prescription
11/ 3/81	Percodan x 20	Dental treatment performed, no entry for prescription
11/16/81	Percodan x 20	No entry for treatment or prescription
11/25/81	Percodan x 20	No entry for treatment performed or prescription
12/21/81	Percodan x 20	No entry for treatment performed or prescription

Date	*Narcotic*	*Respondent's Dental Record*
1/22/82	Percodan x 30	No entry for treatment, prescription
4/13/82	Percodan x 20	Treatment (TMJ pain, equilibrated) and prescription noted
5/24/82	Percodan x 30	No entry for treatment or prescription
6/28/82	Percodan x 30	No entry for treatment or prescription
8/23/82	Percodan x 30	Treatment and prescription noted

II.

On or about February 15, 1983, and thereafter, RESPONDENT had as his dental patient Carol Box. During the course of treatment, RESPONDENT wrote numerous prescriptions for Schedule II narcotics as reflected by Department of Public Safety records. The following is a listing of those prescriptions written and where appropriate, notations from RESPONDENT'S dental records indicating dental treatment.

Date	*Narcotic*	*Respondent's Dental Record*
2/15/83	Percodan x 20	Emergency exam, RX Percodan
2/23/83	Percodan x 20	Exam, RX Percodan
2/28/83	Percodan x 30	Patient complaining of pain, RX Percodan
*3/ 7/83	Percodan x 16	Extract LR7; LR5 DOL DYCALAM; RX Percodan
*3/15/83	Percodan x 16	RX Percodan Pain LR 7

Date	*Narcotic*	*Respondent's Dental Record*
*5/ 2/83	Percodan x 16	RX Percodan, Pain UL 7
*5/18/83	Percodan x 16	RX Percodan. Pain UL 7
6/ 1/83	Percodan x 16	RX Percodan
6/28/83	Percodan x 12	UL 7 Extraction, RX Percodan
6/29/83	Percodan x 12	RX Percodan, Patient's daughter tore up 6/28/83 prescription
7/ 6/83	Percodan x 16	Still having pain, RX Tylox

*DPS records indicate that these prescriptions were altered to obtain larger amounts of Percodan. The amounts indicated above were the amounts actually written by Respondent.

III.

On or about January 4, 1983, and thereafter, RESPONDENT had as his dental patient Roxanne Sabato, aka Schultz. During the course of dental treatment, RESPONDENT wrote numerous prescriptions for Schedule II narcotics as reflected by Department of Public Safety records. The following is a listing of those prescriptions written and where appropriate, notations from Respondent's dental records indicating dental treatment:

Date	*Narcotic*	*Respondent's Dental Record*
1/ 4/83	Percodan x 16	No entry
3/17/83	Percodan x 12	Re-adapted composite around LL 5 - RX Percodan
3/21/83	Percodan x 20	RX Percodan

Date	*Narcotic*	*Respondent's Dental Record*
3/29/83	Percodan x 20	UR 6 - opened - covered with Furmocresol - ZN PO4 cement; RX Percodan
*3/31/83	Percodan x 16	Patient complaining of pain; RX Percodan
4/ 6/83	Percodan x 20	UR 6 - opened all three canals; filed to #35, gutta, RX Percodan
4/12/83	Percodan x 16	No entry, entry on 4/13/83 - canals filled with #35 gutta pts.
4/27/83	Percodan x 20	UR 5 - opened necrotic - both canals filed to #35; RX Percodan
*5/ 9/83	Percodan x 16	No Entry
5/13/83	Percodan x 16	No Entry
5/18/83	Percodan x 16	Pt. complaining of pain; RX Percodan
*6/ 2/83	Tylox x 16	LR 6 - DOB - DyCal - AM; Pt. complaining pain, RX Percodan, UR 7 - DyCal - DL - AM
6/16/83	Tylox x 16	Pt. reports fall, UR 7 - repaired O, RX Tylox

*DPS records indicate that these prescriptions were altered prior to being filled. The amounts indicated above were the amount actually written by RESPONDENT.

IV.

On or about December 28, 1982, and thereafter, RESPONDENT had as his dental patient Kenneth Cook.

During the course of dental treatment, RESPONDENT wrote numerous prescriptions for Schedule II narcotics as reflected by Department of Public Safety records. The following is a listing of those prescriptions written and where appropriate, notations from RESPONDENT'S dental records indicating dental treatment:

Date	*Narcotic*	*Respondent's Dental Record*
12/28/82	Percodan x 16	RX Ceclor, Tylenol
1/ 3/83	Percodan x 20	RX Amoxicillin, Percodan
1/13/83	Percodan x 16	Pt. swollen, LR 2 - 1, RX Ceclor, Percodan
1/20/83	Percodan x 16	RX Ceclor, Percodan
1/31/83	Percodan x 16	RX Ceclor, Percodan
2/10/83	Percodan x 16	RX Ceclor, Percodan
2/21/83	Percodan x 20	RX Amoxicillin, Percodan
2/24/83	No Prescription	Ext. LR 2, LR 1, LL 1
2/28/83	Percodan x 20	RX Percodan
3/ 9/83	Percodan x 20	Pt. complaint of pain UL 1-2, RX Amoxicillin, Percodan
3/16/83	Percodan x 20	RX Percodan
3/22/83	Percodan x 20	Took impression, RX Percodan
3/29/83	Percodan x 20	Pt. complaining pain upper anteriors, RX Percodan
4/ 6/83	Percodan x 20	RX Ceclor, Percodan
4/14/83	Percodan x 16	RX Percodan
4/21/83	Percodan x 21	RX Amoxicillin, Percodan

Date	*Narcotic*	*Respondent's Dental Record*
4/28/83	Percodan x 16	RX Percodan
5/ 4/83	Percodan x 16	RX Amoxicillin, Percodan
5/11/83	Percodan x 21	Pt. complaining of pain LR 2-3, PAX reveals nothing
5/18/83	Percodan x 16	RX Ceclor, Percodan
5/25/83	Percodan x 16	RX Percodan
6 /2/83	Percodan x 20	Ext. UL 2, UR 1, UR 2, UL 8, RX Percodan

V.

It is the opinion of Affiant that RESPONDENT, because of the acts and conduct set out in Paragraph I-IV is guilty of violating the following laws and board rules pertaining to this practice of dentistry:

GUILTY

(1) Article 4551h. NARCOTIC DRUGS, DANGEROUS DRUGS, CONTROLLED SUBSTANCES

It shall be unlawful for a dentist to prescribe, provide, obtain, order, administer, give or deliver to or for any person, narcotic drugs, dangerous drugs or any controlled substances not necessary or required, or where the use or possession of same would promote or further addiction thereto, or to aid, abet, or cause any of same to be done in any manner. For purposes of this Article the terms narcotic drugs, dangerous drugs and controlled substances shall mean those defined or recognized as such by any law of the State of Texas or of the United States.

GUILTY

(2) Article 4549, Section 2 (c)

(c) that the holder thereof has been or is guilty of dishonorable conduct, . . . in the practice of dentistry or dental hygiene.

Dishonorable conduct is defined by Board Rule 382.19.21.001 (8) as follows:

Unprofessional Conduct, dishonorable conduct, and immoral conduct are synonymous terms when applied to the conduct of a dental licensee and include the following:

(8) grossly over-prescribing or dispensing narcotic drugs, dangerous drugs, or controlled substances.

It is further the opinion of Affiant that RESPONDENT, because of the acts and conduct set out in Paragraphs I and III is guilty of violating the following Board rule pertaining to the practice of dentistry:

GUILTY

(3) Board Rule No. 382.19.15.004 - Records and their Transfer

(c) The dispensing, administering, or prescribing of narcotic drugs, dangerous drugs, or controlled substances to or for a dental patient shall be made a part of such patient's dental record, and all such drugs and substances which are kept in the dental office or under the control of the dentist are to be labeled as to content, amount, and date of acquisition.

VI.

Article 4549, Section 2, provides that the Texas State Board of Dental Examiners and the District Courts of this State shall have concurrent jurisdiction and authority, after notice and hearing as hereinafter provided, to suspend or revoke a dental license or a dental hygienist license, to place on probation a person whose license or certificate is suspended, or to reprimand a licensee or certificate holder for any one or more of the following causes:

> (c) that the holder thereof has been or is guilty of dishonorable conduct, . . . in the practice of dentistry or dental hygiene.
>
> (i) that the holder thereof has failed or refused to comply with any State law relating to the regulation of dentists or dental hygienists.
>
> (j) that the holder thereof has failed or refused to comply with the adopted and promulgated rules and regulations of the Board.

The foregoing Complaint is submitted to the Secretary-Treasurer of the Texas State Board of Dental Examiners this the 12th day of December, 1983.

Further Affiant sayeth not.

/s/ DAN M. EVANS
Dan M. Evans

SUBSCRIBED AND SWORN to before me by the said Dan M. Evans, this the 12th day of December, 1983.

/s/ MARY E. HALE
Mary E. Hale
Notary Public in and for
The State of Texas

My Commission Expires: 10/31/84

The foregoing Complaint is hereby filed and docketed with the Texas State Board of Dental Examiners and styled Texas State Board of Dental Examiners vs. Charles W. Sizemore, D.D.S., under Docket Number 1983-34, this the 19th day of December, 1983.

/s/ NEIL A. MORGAN, D.D.S.
Neil A. Morgan, D.D.S.
Secretary-Treasurer
Texas State Board
of Dental Examiners

APPENDIX C

FINDINGS AND ORDERS OF THE BOARD
COMPLAINT AND DOCKETED COMPLAINT
NUMBER 1983-34

THE STATE OF TEXAS

TEXAS STATE BOARD OF DENTAL EXAMINERS

v.

CHARLES W. SIZEMORE, D.D.S.
KEYSTONE PARK
13931 NORTH CENTRAL EXPRESSWAY
SUITE 316
DALLAS, DALLAS COUNTY, TEXAS 75243
HOLDER OF TEXAS DENTAL LICENSE NO. 8722

On the 2nd and 3rd days of March, 1984, the Texas State Board of Dental Examiners met in the Castillian A, B, C Meeting Room at the Shamrock Hilton Hotel in Houston, Harris County, Texas, for the purpose of hearing and considering the instant Docketed Complaint No. 1983-34, as well as for the transaction of other business. A quorum and a majority of the membership of the Texas State Board of Dental Examiners were present, to wit:

Dr. Rene E. Holt, President
Dr. Jack T. Clark, President Elect (absent excused)
Dr. Will F. Graham, 1st Vice President (absent excused)
Dr. Brian Babin, 2nd Vice President
Dr. Neil A. Morgan, Secretary Treasurer (present, not voting)
Dr. L. Jack Bolton

Mr. Joseph E. Gardner, Jr.
Dr. Randolph D. Minatra
Dr. Frank Santos, Jr.
Mrs. Geraldine Tucker
Mrs. Evelynne H. Vick
Dr. John D. Wilbanks (did not participate)

The President called said Docketed Complaint for hearing, the State announced ready, and the RESPONDENT, CHARLES W. SIZEMORE, D.D.S., being present and represented by counsel, The Hon. Joe Alfred Izen, Jr., did thereupon enter a plea of NOT GUILTY.

FINDINGS OF FACT

1. Dr. Charles W. Sizemore is the holder of Texas Dental License No. 8722 and was the holder of this license at all times material to Docketed Complaint No. 1983-34.

2. All statutory requirements for the jurisdiction of the Board have been met.

3. On or about September 10, 1981, and thereafter, Dr. Sizemore had as his dental patient Danny McKay.

4. Dr. Sizemore provided dental treatment to Mr. McKay and during the course of the dental treatment, Dr. Sizemore prescribed the following Schedule II narcotics to Mr. McKay:

9/10/81	Percodan	x 20 capsules
10/9/81	Percodan	x 20 capsules
10/28/81	Percodan	x 20 capsules
11/3/81	Percodan	x 20 capsules
11/16/81	Percodan	x 20 capsules
11/25/81	Percodan	x 20 capsules

12/21/81	Percodan	x 20 capsules
1/22/82	Percodan	x 30 capsules
4/13/82	Percodan	x 20 capsules
5/24/82	Percodan	x 30 capsules
6/28/82	Percodan	x 30 capsules
8/23/82	Percodan	x 30 capsules

5. With the exception of the prescriptions written on 4/13/82 and 8/23/82, no entry, indicating a prescription was written to Mr. McKay, was made by Dr. Sizemore in Mr. McKay's dental records.

6. The amount of Schedule II narcotics prescribed by Dr. Sizemore to Mr. McKay was in excess of generally accepted dosages for dental treatment.

7. On or about January 4, 1983, and thereafter, Dr. Sizemore had as his dental patient Roxanne Sabato, a/k/a/ Schultz.

8. Dr. Sizemore treated Ms. Sabato's dental needs and during the course of treatment prescribed the following Schedule II narcotics to Ms. Sabato:

1/4/83	Percodan	x 16 capsules
3/17/83	Percodan	x 12 capsules
3/21/83	Percodan	x 20 capsules
3/29/83	Percodan	x 20 capsules
3/31/83	Percodan	x 16 capsules
4/6/83	Percodan	x 20 capsules
4/12/83	Percodan	x 16 capsules
4/27/83	Percodan	x 20 capsules
5/9/83	Percodan	x 16 capsules
5/13/83	Percodan	x 16 capsules
5/18/83	Percodan	x 16 capsules
6/2/83	Tylox	x 16 capsules
6/16/83	Tylox	x 16 capsules

9. Of the prescriptions written to Ms. Sabato, those written on 1/4/83, 4/12/83, 5/9/83 and 5/13/83 were not recorded by Dr. Sizemore with an entry in Ms. Sabato's dental records.

10. The amount of Schedule II narcotics prescribed by Dr. Sizemore to Ms. Sabato was in excess of generally accepted dosages for dental treatment.

11. On or about December 28, 1982, and thereafter, Dr. Sizemore had as his dental patient Kenneth Cook.

12. Dr. Sizemore treated Mr. Cook's dental needs and during the course of the treatment prescribed the following Schedule II narcotics to Mr. Cook:

12/28/82	Percodan	x 16 capsules
1/3/83	Percodan	x 20 capsules
1/13/83	Percodan	x 16 capsules
1/20/83	Percodan	x 16 capsules
1/31/83	Percodan	x 16 capsules
2/10/83	Percodan	x 16 capsules
2/21/83	Percodan	x 20 capsules
2/28/83	Percodan	x 20 capsules
3/9/83	Percodan	x 20 capsules
3/16/83	Percodan	x 20 capsules
3/22/83	Percodan	x 20 capsules
3/29/83	Percodan	x 20 capsules
4/6/83	Percodan	x 20 capsules
4/14/83	Percodan	x 16 capsules
4/21/83	Percodan	x 21 capsules
4/28/83	Percodan	x 16 capsules
5/4/83	Percodan	x 16 capsules
5/11/83	Percodan	x 21 capsules
5/18/83	Percodan	x 16 capsules
5/25/83	Percodan	x 16 capsules
6/2/83	Percodan	x 20 capsules

13. The Schedule II narcotic prescriptions written by Dr. Sizemore to Mr. Cook are in excess of generally accepted dosages for dental treatment.

CONCLUSIONS OF LAW

1. Dr. Sizemore is guilty of prescribing controlled substances not necessary or required in the practice of dentistry and where the prescription and use of such would promote and further addiction in violation of Article 4551h.

2. Dr. Sizemore is guilty of dishonorable conduct in that he grossly over-prescribed narcotic drugs in violation of Article 4549, Section 2 (c), as defined by Board Rule No. 382.19.21.001 (8).

3. Dr. Sizemore is guilty of failing to make the prescription of narcotic drugs a part of his patient's dental records as required by Board Rule 382.19.15.004.

ORDER

BE IT KNOWN that on the 3rd day of March, 1984, a quorum of the Texas State Board of Dental Examiners have voted, by majority vote, to SUSPEND for a period of FIVE (5) YEARS, effective May 1, 1984, License Number 8722 heretofore issued to Charles W. Sizemore, D.D.S., of Dallas, Texas; however, such SUSPENSION is PROBATED for all but ONE HUNDRED TWENTY (120) DAYS thereof (May 1, 1984 through August 29, 1984), subject to the following, to wit:

1. Dr. Sizemore will conduct himself in conformity with this Order, shall conform to all laws and rules and regulations governing the practice of dentistry in this State.

2. Dr. Sizemore's office is to be closed except for administrative purposes (making future appointments when suspension is over, opening mail, referring patients, accepting payments on accounts and general office chores.)

3. Dr. Sizemore is prohibited from engaging in professional activities in any dental premises so as to derive monetary gain as privileged by virtue of his Texas dental license during such 120 day downtime. All direct and indirect supervisory privileges are included in this prohibition.

4. If there is an associate arrangement, the associate can continue to work on his own patients of record, but the provisions listed above still apply.

5. Dr. Sizemore's Schedule II and II-N drug certificates shall be surrendered May 1, 1984 and shall not be renewed until such has been approved for reissuance by the Texas State Board of Dental Examiners, such decision to be at the discretion of the Board.

IT IS ACCORDINGLY ORDERED that License Number 8722, heretofore issued to CHARLES W. SIZEMORE, D.D.S., be SUSPENDED for FIVE (5) YEARS effective May 1, 1984; however, such SUSPENSION is PROBATED for all but ONE HUNDRED TWENTY (120) DAYS thereof (May 1, 1984 through August 29, 1984), subject to the foregoing conditions.

EXECUTED this 17th day of April, 1984.

/s/ DR. RENE E. HOLT
Dr. Rene E. Holt
President

April 9, 1984
Date

/s/ DR. JACK T. CLARK Dr. Jack T. Clark President Elect (Absent Excused)	April 10, 1984 Date
/s/ DR. WILL F. GRAHAM Dr. Will F. Graham 1st Vice President (Absent Excused)	April 9, 1984 Date
/s/ DR. BRIAN BABIN Dr. Brian Babin 2nd Vice President	April 10, 1984 Date
/s/ DR. NEIL A. MORGAN Dr. Neil A. Morgan Secretary Treasurer (Present, Not Voting)	April 9, 1984 Date
/s/ DR. L. JACK BOLTON Dr. L. Jack Bolton	April 9, 1984 Date
/s/ MR. JOSEPH E. GARDNER, JR. Mr. Joseph E. Gardner, Jr.	April 9, 1984 Date
/s/ DR. RANDOLPH D. MINATRA Dr. Randolph D. Minatra	April 9, 1984 Date
/s/ DR. FRANK SANTOS, JR. Dr. Frank Santos, Jr.	April 9, 1984 Date
/s/ MRS. GERALDINE TUCKER Mrs. Geraldine Tucker	April 8, 1984 Date
/s/ MRS. EVELYNNE H. VICK Mrs. Evelynne H. Vick	April 10, 1984 Date
/s/ DR. JOHN D. WILBANKS Dr. John D. Wilbanks (Not Participating)	April 8, 1984 Date

APPENDIX D

NO. 84-8575-D

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

CHARLES W. SIZEMORE, D.D.S.

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

MEMORANDUM OPINION AND ORDER

For prescribing narcotic drugs unnecessarily and without making corresponding notations to patients' dental records, the Texas State Board of Dental Examiners has suspended the license of Charles W. Sizemore, D.D.S., for five years, all but 120 days of which has been probated, and revoked his certificates to prescribe narcotic drugs. Sizemore appeals from the Board's decision to this Court.

I

The Board faulted Sizemore for his treatment of three patients.

Danny McKay came to Sizemore apparently complaining of jaw pain. For eleven months from September 10, 1981, to August 23, 1982, Sizemore gave McKay twelve prescriptions for a total of 280 capsules of Percodan, a Schedule II controlled substance. Sizemore noted only two precriptions for a total of 50 capsules on McKay's dental record. During this time Sizemore actually treated

McKay only occasionally. At the hearing before the Board Sizemore testified as follows:

> Q. Well, overall, do you think you did the patient right?
>
> A. I don't think he received the total care that he should have received, but I'm not saying that I wasn't in error in judgment, but at the same time, I'm saying that some of this was due to the patient.
>
> Q. He received the same care that you would want one of your family to receive?
>
> A. No, he didn't. I didn't say that.

(Transcript at 283, lines 3-12.)

Roxann Sabato Schultz sought treatment for dental problems that Sizemore concluded were complicated by the presence of infection. For over five months from January 4 through June 16, 1983, Sizemore gave Schultz thirteen prescriptions for a total of 220 capsules of Percodan, in spite of the fact that Percodan contains aspirin and Schultz had indicated to Sizemore that she was allergic to aspirin. "It's obvious that I overlooked that on the chart," Sizemore testified. (Transcript at 261, lines 6-7.) Sizemore failed to note four of the prescriptions on Schultz's dental records.

Kenneth Cook received 21 prescriptions for a total of 382 capsules of Percodan from Sizemore over a five-month period from December 28, 1982, to June 2, 1983. Sizemore prescribed 121 tablets over a period of less than two months. Sizemore testified at the Board hearing:

> Q. Okay. Did it ever occur to you in that two-month period [from December 28 to February 24]

> that 121 tablets of Percodan is excessive for a patient that comes into your office. Did you ever think about how much Percodan you were giving this patient?
>
> A. I see now in retrospect and the way it looks on this record I should probably have noticed, but it did not occur to me or I would not have continued to prescribe it for him.

(Transcript at 232, lines 6-14.) "I'm not saying my judgment was not in error," Sizemore testified. (Transcript at 233, lines 14-15.) "[P]erhaps it's obvious that my judgment was not so good in this matter." (Transcript at 235, lines 15-16.)

It is undisputed that Sizemore failed to record his prescriptions of narcotic drugs on the patients' dental records, and the Board so found. The Board also found that Sizemore's prescriptions to McKay, Schultz and Cook exceeded generally accepted dosages.

II

For four reasons, Sizemore contends the Board's decision must be reversed.

A

Sizemore attempts to argue that because dentists were subject to a licensing statute enacted in 1873 which provided for prosecutions tried before juries, that he is entitled to a jury under the Texas Constitution. The argument, confusing at best, is simply without merit.

Sizemore's appeal to this Court is governed by the substantial evidence rule. Article 4548h, § 3(e), Texas Revised Civil Statutes Annotated; *Texas State Board of*

Dental Examiners v. Friedman, 666 S.W.2d 363, 364 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Texas State Board of Dental Examiners v. Fieldsmith*, 386 S.W.2d 305, 306-307 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.), *cert. denied*, 382 U.S. 977 (1965); *Texas State Board of Dental Examiners v. Fenlaw*, 357 S.W.2d 185, 187 (Tex. Civ. App.—Dallas 1962, no writ). Whether an agency decision is supported by substantial evidence is a question of law for the Court and not a question of fact for a jury. 2 Tex. Jur. III *Administrative Law* § 78, at 278-279 (1979).

B

Sizemore argues that the Board could not sanction him without finding that he *intentionally* over-prescribed narcotics and failed to keep proper records. Sizemore's argument is based upon *Texas State Board of Dental Examiners v. Friedman*, 666 S.W.2d 363, 364 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), which held that the Board could not sanction a dentist for permitting an unlicensed person to practice dentistry without a finding of intent. *Friedman* did not hold that every action to be sanctioned by the Board, and specifically Sizemore's actions found in this case, must be done intentionally. Furthermore, while it is understandable, as in *Friedman*, that a dentist could unknowingly permit a person to practice dentistry without a license, it is inconceivable that a dentist could unknowingly prescribe narcotic drugs to excess and fail to record the prescriptions in the patients' records. No finding of intent is required in this case, but even if it were, it is implied within the findings the Board did make.

C

Sizemore argues that the Board's decision is not supported by substantial evidence. As summarized above, the record contains substantial, if not virtually conclusive, evidence in support of the Board's ruling.

D

Sizemore argues that it is fundamentally unfair for his license suspension to be heard by the same Board charged with investigating his conduct. Sizemore cites no authority for his position, and the Court is aware of none. The procedures followed by the Board are common to many other administrative agencies. *See* article 6252-13a, Texas Revised Civil Statutes Annotated (Vernon Supp. 1985). Sizemore complains that the Board's cross-examination was conducted in the role of an advocate. The Court has carefully reviewed the entire record for evidence that the Board conducted itself inconsistently with its quasi-judicial responsibilities, and finds none.

III

IT IS THEREFORE ORDERED that judgment be rendered in accordance with this Opinion affirming the Board's decision.

Signed: November 18, 1985,

/s/ NATHAN L. HECHT
District Judge

APPENDIX E

NO. 84-8575-D

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

CHARLES W. SIZEMORE, D.D.S.

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

JUDGMENT

On March 21, 1985, this action came on for hearing before the Court, Honorable Nathan L. Hecht, District Judge, presiding. Plaintiff Charles W. Sizemore, D.D.S., and defendant Texas State Board of Dental Examiners appeared by counsel and presented argument. The issues having been duly heard, and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Texas State Board of Dental Examiners rendered April 17, 1984, in matter no. 1983-34, styled "Texas State Board of Dental Examiners v. Charles W. Sizemore, D.D.S.", is affirmed, that plaintiff Charles W. Sizemore, D.D.S., take nothing against defendant Texas State Board of Dental Examiners, and that defendant Texas State Board of Dental Examiners recover from plaintiff Charles W. Sizemore, D.D.S., its court costs, for which let execution issue.

Signed: November 18, 1985.

/s/ NATHAN L. HECHT
District Judge

APPENDIX F

NO. 84-8575-D

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

CHARLES W. SIZEMORE, DDS

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

REFORMED JUDGMENT

On March 21, 1985, this action came on for hearing before the Court, Honorable Nathan L. Hecht, District Judge, presiding. Plaintiff Charles W. Sizemore, D.D.S., and Defendant Texas State Board of Dental Examiners appeared by counsel and presented argument. The issues having been duly heard, and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Texas State Board of Dental Examiners rendered April 17, 1984, in matter no. 1983-34, styled "Texas State Board of Dental Examiners v. Charles W. Sizemore, D.D.S.", is affirmed, that Plaintiff Charles W. Sizemore, D.D.S., take nothing against Defendant Texas State Board of Dental Examiners, and that Defendant Texas State Board of Dental Examiners recover from Plaintiff Charles W. Sizemore, D.D.S., its court costs, for which let execution issue.

IT IS FURTHER ORDERED that the Order of the Texas State Board of Dental Examiners, rendered on

April 17, 1984, become effective January 2, 1986, if appealed, or 45 days after all appeals in Texas Courts have been exhausted.

SIGNED: November 26, 1985.

/s/ NATHAN L. HECHT
District Judge

APPENDIX G

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00189-CV

CHARLES SIZEMORE, D.D.S.,
Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Appellee.

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC
OPINION BY JUSTICE HOWELL
DECEMBER 28, 1987

For prescribing narcotic drugs, primarily Percodan, where "not necessary or required," and for "grossly over-prescribing" those drugs, and for failing to make complete notations of narcotic prescriptions on the patients' dental records, the Texas State Board of Dental Examiners suspended the license of Charles W. Sizemore, D.D.S., for five years, all but 120 days of which was probated, and revoked his certificate to prescribe narcotics. The trial court upheld the Board's decision and he appeals to this court. We find that the revocation is not supported by substantial evidence and reverse.

The Controlled Substances Act requires that duplicate copies of all scheduled prescriptions be forwarded to the

Texas Department of Public Safety by the pharmacist who fills the prescription. This case was brought to the Board's attention by the DPS after a routine review of duplicate prescriptions emanating from appellant's office. A staff investigator for the Board then went to appellant's office and examined his case files at length. The Board thereafter held a hearing and faulted appellant for his treatment of three patients:

(1) Danny McKay was treated by appellant for jaw pain. For eleven months, from September 10, 1981, to August 23, 1982, appellant gave McKay twelve prescriptions for a total of 280 tablets of Percodan, a Schedule II controlled substance.[1] Appellant noted only two prescriptions for a total of 50 tablets on McKay's dental record.

---

1. Percodan is a trademarked product of DuPont Pharmaceuticals, Inc. *Physician's Desk Reference* 409, 860-61 (40th ed. 1986) (*PDR*). The tablets are bright yellow and are sold by the manufacturer in packages ranging in size from twenty-five to 1000 tablets. Each tablet contains 4.50 milligrams (mg) of oxycodone hydrochloride, 0.38 mg of oxycodone terephthalate, and 325 mg. of aspirin. *Id.* at 860. By way of comparison, the standard aspirin tablet contains 5 grains or 324 mg. of medication. *Taber's Cyclopedic Medical Dictionary* (F.A. Davis Co., Philadelphia, PA 1949 Ed.) p. A-101.

While quantitatively minor, the oxycodone components represent the major medicinal value of the tablet. Oxycodone is a semi-synthetic narcotic analgesic with actions qualitatively similar to morphine. The principal therapeutic values are analgesia (pain relief) and sedation (sleep inducement). Oxycodone is similar to codeine in that it retains at least one-half of its analgesic activity when administered orally. *Id.* at 860-61.

PDR states, "*Indications*: For the relief of moderate to moderately severe pain." *Id.* at 860. It states that ambulatory patients should be cautioned that their ability to drive a car or operate machinery may be impaired while under the medication. It states that the medication should be given with caution to the elderly or the debilitated. *Id.*

(2) Roxanne Sabato Schultz sought treatment for dental problems that appellant concluded were complicated by the presence of infection. For over five months, from January 4 through June 16, 1983, appellant gave Schultz thirteen prescriptions, eleven for Percodan and two for Tylox, also a Schedule II substance, for a total of 220 tablets, omitting to note four of those prescriptions totalling 60 tablets on Schultz's records.

(3) Kenneth Cook received 21 prescriptions for a total of 382 tablets of Percodan from appellant over a five-month period from December 28, 1982, to June 2, 1983. During this time, appellant prescribed 121 tablets over a period of less than two months. However, the record keeping with respect to patient Cook is unchallenged.

By its order, the Board made, in substance, the foregoing findings of fact and then entered the following "conclusions of law":

> 1. Dr. Sizemore is guilty of prescribing controlled substances not necessary or required in the practice of dentistry and where the prescription and use of such would promote and further addiction in violation of Article 4551h.
>
> 2. Dr. Sizemore is guilty of dishonorable conduct in that he grossly over-prescribed narcotic drugs in violation of Article 4549, Section 2(c), as defined by Board Rule No. 382.19.21.001(8).
>
> 3. Dr. Sizemore is guilty of failing to make the prescription of narcotic drugs a part of his patient's dental records as required by Board Rule No. 382.19.15.004.

We hold that the conclusions in the first and second paragraphs are not supported by substantial evidence.

It is to be noted that conclusion number one is in the conjunctive, but the statute is in the disjunctive, to-wit:

> It shall be unlawful for a dentist to prescribe or deliver to or for any person . . . any controlled substances not necessary or required, or where the use or possession of same would promote or further addiction thereto, ...

TEX. REV. CIV. STAT. ANN. art. 4551h (Vernon Supp. 1986). We would be required to uphold conclusion one if we found substantial evidence that the prescriptions were either (1) not necessary or required, or (2) promoted or furthered addiction. However, there is no substantial evidence to support either part of the Board's first conclusion.

The Board's only witness was Dr. Arthur H. Jeske. His testimony related to the propriety of appellant's drug prescriptions. He based his testimony upon his review of appellant's treatment records. He neither interviewed nor examined the patients themselves. The patients were not called. Neither did the Board's investigator testify. Patients Schultz and Cook suffered from oral infections, which appellant treated with antibiotics. Patient McKay suffered from an ailment associated with the temporal mandibular joint in his lower jaw, known as TMJ.

On direct examination, Dr. Jeske expressed his expert opinion that appellant's prescriptions exceeded the "generally accepted dosages" for dental treatment, but on cross-examination, he made several significant qualifications to this testimony. He also testified that, in his

opinion, another course of treatment not involving analgesics would have been more suitable for patient McKay. He further testified by way of conclusion that the course of medication given "could promote or further addiction;" there was no testimony it *would* do so. Neither did he give any specifics; he failed to state what dosages, if any, would have been the maximum safe and proper amounts under the conditions shown.

Appellant's testimony was that all drugs prescribed were reasonably needed for the proper care and treatment of the patients. He testified that Mr. McKay had been a regular patient for several years prior to the onset of TMJ problems. Mr. McKay repeatedly came to appellant's office unannounced and without prior notice complaining of intense pain. Appellant would interrupt his schedule, would briefly examine him, would prescribe Percodan to relieve the symptoms, and would provide Mr. McKay with an appointment for treatment. Thereafter, Mr. McKay usually broke the appointment only to repeat his emergency appearance when pain again manifested itself. Appellant testified that he would have refused to treat patient McKay long before he did sever relations with this patient except for the established relationship.

Concerning patients Schultz and Cook, appellant testified that they both had teeth that were badly infected and painful when they first consulted with him. The teeth could not be successfully treated and prostheses applied until the infections were cleared up. Antibiotics were prescribed and, pending the clearance of the infections, Percodan was prescribed for the control of the pain. Following the disappearance of the respective infections,

dental restorations were completed and the patients were released.

Appellant testified that none of the patients was in danger of addiction. He testified that he instructed them each not to take more than four tablets of Percodan in any twenty-four hour period. The average usage by each patient was much lower. Appellant testified that the early warning sign of drug dependency is a patient who consumes the prescribed medication at the maximum allowable rate or faster and who immediately demands an additional prescription. As appellant demonstrated from the State's exhibits, all of the patients voluntarily refrained from usage at or near the maximum prescribed levels indicating, according to appellant's testimony, an ability to engage in self-control and a healthy attitude toward narcotic drugs.

It is not our province to weigh the evidence. The only question before us is whether the testimony before the Board constituted substantial evidence in view of the nature and purpose of the proceedings being had. In other words, was there a sufficient basis in the evidence for the Board to conclude that appellant's license to practice dentistry should be suspended or revoked or that he should be otherwise disciplined? We conclude that the evidence contained no such basis.

Before analyzing the evidence further, we first consider the standard to be employed.

> [T]he practice of dentistry is a lawful profession, ... [T]he right or privilege to engage in it, once it is lawfully acquired, is a right or privilege protected by the due process clauses of the state and federal constitutions. . . .
>
> * * *

> The right to practice a profession has been called a property right, but it is more. . . . There is moreover a prestige and good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him poor indeed.

Francisco v. Board of Dental Examiners, 149 S.W.2d 619, 622 (Tex. Civ. App.—Austin 1941, writ ref'd) (quoting *Waller v. State,* 68 S.W.2d 601, 605 (Tex. Civ. App.—Amarillo 1934, writ ref'd)).

Arrayed against the interest of the individual is the interest of the public. The public must be protected from negligence, incompetence and wilful misconduct in the practice of the profession. *Texas State Board of Dental Examiners v. Fenlaw,* 357 S.W.2d 185, 189-90 (Tex. Civ. App.—Dallas 1962, no writ). However, due process places limitations upon the power to regulate, that limitation being the legitimate interest of the public in controlling the conduct of the individual practitioner. *Waller v. State,* 68 S.W.2d 601, 603-04 (Tex. Civ. App.—Amarillo 1934, writ ref'd). His license may be revoked or suspended or otherwise restricted only upon proof of conduct injurious to the public welfare; proof must be made of negligence, incompetence, or wilful misconduct. Even though the applicable statutes and rules do not expressly provide to this effect, we must construe them as implying such a requirement, else they offend the constitution.

We also point out that an action of this nature is necessarily punitive in effect. *State Board of Dental Examiners v. Neeley*, 574 S.W.2d 244, 245 (Tex. Civ. App.—Austin 1978, no writ) (dental practice disciplinary statutes "are penal in nature and should be strictly construed"). Indeed, professional misconduct proceedings have been described as quasi-criminal. *In re Ruffalo*, 390 U.S. 544, 550-51 (1968) (attorney disbarment). It follows that evidence of conduct injurious to the public welfare must be substantial.

We must bear in mind that the amelioration of human illness, disease and disability is at most an inexact science. It is commonly referred to not as the healing *science* but the healing *art*. Legitimate differences of opinion as to the proper course of treatment are commonplace. As long as the difference was legitimate, the fact that the Board's expert, Dr. Jeske, or the Board itself did not feel that the course of treatment was "proper" did not constitute a ground for the imposition of sanctions.

Turning to the legal grounds upon which the Board found against appellant, we hold that article 4551h proscribes the improper administration of narcotics without respect to quantity; that is, article 4551h does not address the question of grossly excessive quantity. On the other hand, Board Rule 382.19.21.001(8) proscribes the administration of grossly excessive quantities of those drugs. Texas State Board of Dental Examiners, 22 TEX. ADMIN. CODE § 109.211 (8) (Hart. 1986).[2] The Board itself

2. The above-cited rule provides as follows: "Unprofessional conduct, dishonorable conduct, and immoral conduct are synonymous terms when applied to the conduct of a licensee and include the following: . . . (8) grossly over-prescribing or dispensing narcotic drugs, dangerous drugs, or controlled substances. . . ."

implicitly but necessarily made the foregoing determination in the adoption of its rule. Obviously, the Board has no power to add to or detract from a statute. By adopting a rule pertaining to the subject, it must be considered to have made the administrative determination that the statute did not speak to the problem of prescribing in grossly excessive quantities.

With the foregoing standards in mind, we review the testimony of the Board's witness, Dr. Jeske. He readily admitted that he knew nothing of the patients except as reflected by appellant's records. With respect to patient McKay, he testified that he had "generally . . . observed" that TMJ pain "responds better" to a non-narcotic course of treatment consisting of "anti-inflammatory [drugs] and splint therapy." He conceded that TMJ patients can experience "very severe pain," and that if a TMJ patient does experience such pain, then it "may be necessary" to use Percodan. Although Jeske stated that such an instance would be "an exception, I would say," he was unable to be specific with respect to patient McKay, never having interviewed or examined him. He further agreed that the amount of pain relief to which a TMJ patient is entitled is a matter of the dentist's subjective judgment. He also agreed that "there is a lot of controversy in TMJ treatment."

With respect to patients Schultz and Cook, whose conditions were similar to each other, Jeske conceded that infections must be controlled before procedures such as root canals are commenced and agreed that narcotics might be necessary to control pain while antibiotics are being administered. He agreed that "in some instances," Percodan might be an acceptable medication for these

patients and conceded that without seeing the patients, he could not state with reasonable certainty that Percodan, in any amount at all, was neither necessary nor desirable.

Rather, Dr. Jeske centered his criticism on the duration of the courses of treatment that consisted of antibiotics plus Percodan. Tissue cultures should have been obtained and analyzed or the patient referred to an oral surgeon, he testified, unless a response manifested itself at an earlier date. Appellant's position was that he was of the opinion that responses *were* manifesting, although slowly. It is significant that Dr. Jeske wholly failed to testify that no reasonably competent practitioner similarly situated would have continued the same course of treatment for an equivalent period of time. Without testimony to such effect, Dr. Jeske's testimony amounts to no more than a legitimate difference of opinion as to the proper course of treatment.

In the context of a license revocation proceeding, we hold that testimony of the foregoing nature was insufficient to qualify as substantial evidence of any violation of the first two of the above-quoted prohibitions of article 4551h. That is, the Board failed to present evidence that was clearcut and reasonably free from doubt to the effect that appellant was "guilty of prescribing controlled substances neither (1) "necessary" nor (2) "required" to the extent that the public welfare would be threatened if such conduct were to continue unchecked. In order to prove a punishable violation of these provisions, there had to be evidence, apart from evidence as to frequency and duration, that the medication was not needed or that it was, for some specific reason, contra-indicated,

and that any reasonable practitioner, similarly situated, would have been aware of such effect. The first "not necessary or required" portion of conclusion number one must be set aside.

Conclusion number one further held appellant "guilty of prescribing controlled substances . . . [in a manner that would] promote and further addiction." It is common knowledge, and discussions before the Board so indicate, that any administration of narcotics whatever *could conceivably lead* to addictive problems. Such drugs are virulent; they are contra-indicated whenever less toxic medications promise to be effective.[3] However, they remain as accepted pharmacology because of their extreme effectiveness in the alleviation of human suffering. Dr. Jeske conceded that, not having seen the patients, he could not state with assurance that appellant absolutely should not have prescribed Percodan in any quantity whatever. Elsewhere, he gave his testimony by way of conclusion that appellant prescribed the substance in a manner "that *could* promote and further addiction." But, the identical statement may be made in *every* case where *any* quantity of a narcotic drug is administered. Certainly, the "promote and further" provision of article 4551h does not warrant license revocation in every instance involving the administration of narcotics.

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3. *Physician's Desk Reference* contains a plain warning that Percodan may be habit-forming and states:

> Oxycodone can produce drug dependence of the morphine type and, therefore, has the potential of being abused. Psychic dependence, physical dependence and tolerance may develop upon repeated administration . . . , and it should be prescribed and administered with the same degree of caution appropriate to the use of other oral narcotic-containing medications.

PDR at 860.

What is the dividing line between the permissible and the impermissible administration of narcotics? We hold that there is no punishable violation of the "promote and further" restriction of article 4551h unless evidence of negligence, incompetence or wilful misconduct is presented to the Board; the drug must have been administered in a manner that would not have been undertaken by any reasonably competent practitioner similarly situated. Such proof must be substantial; the conduct must be injurious to the public welfare. Dr. Jeske's unembellished testimony that, in his opinion, without seeing the patient, appellant prescribed the drug in a manner that *could* promote and further addiction because the witness considered that the courses of narcotic therapy lasted "longer than they should have," did not rise above a suspicion or scintilla. *See Joske v. Irvine,* 91 Tex. 574, 582-83, 44 S.W.2d 1059, 1063 (1898). We so hold because he failed to state a maximum frequency or period beyond which no reasonable practitioner, similarly situated, would have continued the treatment. Probative evidence of such nature is indispensable in a proceeding of a "penal nature" such as the case in hand. *Neeley,* 574 S.W.2d at 245. With respect to its "promote and further" finding under conclusion number one, the Board did not receive evidence of a nature that would warrant separating one of its licensees from his livelihood. The remainder of conclusion one must be set aside.

Conclusion two must fall because the Board's witness wholly failed to testify that appellant "grossly overprescribed narcotic drugs," either by using the foregoing words of Board Rule 382.19.21.001(8) or by employing language of an unmistakably similar import. The subject required expertise; no layman could validly conclude

merely from being advised of the dosages administered that appellant not only had over-prescribed but had *grossly* over-prescribed.

Neither could the Board rely upon its own expertise. Although we are confident that certain members of the Board were persons highly qualified in the dental profession, their qualifications were not placed in evidence. Nor was appellant afforded an opportunity to cross-examine the Board as to any expert opinion that it may have entertained. Nothing is more thoroughly established than the proposition that neither a judge nor a juror may act as a witness. *Glasser v. United States*, 315 U.S. 60, 82 (1942) (judge); *Gregory v. St. Louis Southwestern Railway Co.*, 377 S.W.2d 847, 853 (Tex. Civ. App.—Texarkana 1964), *rev'd on other grounds*, 387 S.W.2d 27 (Tex. 1965) (juror). For us to hold that the Board may do otherwise would amount to the deprivation of cross-examination and the condonation of secret evidence. If a Board member desired to give his personal opinion, based upon his own professional expertise, that appellant had grossly over-prescribed, it was incumbent on that member to disqualify himself as a trier of the case and take the oath as a witness.

In its findings of fact and conclusions of law, the trial court below emphasized the total number of tablets prescribed, amounting to 882 separate dosages, and counsel for the State has argued a similar tack. Admittedly, the raw number would be impressive to any layperson. However, the number must be divided between three patients and over a substantial period of time. During a two-month period, patient Cook received 121 tablets, being at the rate of two per day. All other dosages were at a

lower frequency. It does not strike us that two pain pills per day for a person suffering intense pain must inevitably be declared exorbitant.

To the contrary, witness Jeske paid no attention to the frequency of the dosage. His criticism centered upon the duration of the treatment. Did appellant administer these drugs for a grossly excessive period of time? Lacking expert testimony to this effect, we can only engage in conjecture.[4] Lacking expert testimony, the Board could not so hold. Conclusion two is set aside.

It is a well accepted principle of civil practice that the appellate court must both reverse and render when there is no evidence to support the judgment below. *National Life & Accident Ins. Co. v. Blagg,* 438 S.W.2d 905, 909

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4. *Physician's Desk Reference* states: "The information concerning each product has been prepared, edited and approved by the medical department, medical director, and/or medical counsel of each manufacturer." *PDR* at 501.

It is stated that wherever the manufacturer has prepared an official package circular for distribution to pharmacists and to the medical profession, and the circular has been approved as to content by the Food and Drug Administration, then under FDA regulations, the "indications and usage, dosages, routes, methods, and frequency and duration of administration, description, clinical pharmacology and supply and any relevant warnings, hazards, contraindications, adverse reactions, potential for drug abuse and dependence, overdosage and precautions" must be repeated verbatim in *PDR*. *PDR* at 501.

As discussed in previous footnotes, the PDR discussion of Percodan contains generalized statements of precautions concerning this and all narcotic drugs. It also indicates the maximum frequency of dosage (generally, six hours). However, there is no specific durational limitation whatever and no discussion as to the maximum period of time after which the medication must be discontinued. From all appearances, the manufacturer, and quite possibly the FDA as well, has not seen fit to issue specific warnings as to the length of time beyond which the administration of Percodan must be terminated. The matter has been left within the judgment of the practitioner issuing the prescription.

(Tex. 1969). The "no evidence" rule does not mean utterly not a shred—it means no evidence of the minimal quantum that the law holds necessary to support a judgment. In short, the evidence must rise above suspicion and surmise and reach the level of a reasonably trustworthy basis for the action sought. *Joske,* 91 Tex. at 582-83, 44 S.W.2d at 1063. Because we have held that there was no substantial evidence to support the allegations that appellant gave narcotic prescriptions to three patients, which prescriptions were not necessary or required; or that he issued prescriptions that promoted and furthered addiction; or that appellant grossly over-prescribed such narcotics, we both reverse and render upon all such allegations. With respect to conclusions one and two, appellant is discharged.

Turning to conclusion three, no expert testimony and no subjective evaluation of the evidence was required to demonstrate that appellant had indeed failed to note all of his narcotic prescriptions upon the dental records relating to patients McKay and Schultz. He admitted as much. However, the inquiry does not end there. It is the rare human who never commits a recordkeeping error. Patient McKay's penchant to appear without appointment when appellant was otherwise engaged and when the patient's records would be stored away might well serve to explain, but not necessarily justify, appellant's erratic recordkeeping with respect to this patient. We also note in passing that there were fewer omissions in the records pertaining to patient Schultz and no omissions in the records of patient Cook, neither of whom came to appellant until a later date. In view of our disposition of the alleged recordkeeping violations, we refrain from further comment upon the evidence relating thereto.

We hold that the Board failed to apply the proper test. To warrant the punitive sanctions to which these proceedings were directed, it was insufficient for the State to merely show a failure, any failure, to comply with the recordkeeping rule and to rest. The evidence must rise to the level of professional misconduct. In other words, there must be evidence, free from reasonable doubt, of negligence, incompetence or wilful misconduct of a nature that threatens the public welfare if allowed to continue unchecked. We do not hold that expert testimony will be necessary when a recordkeeping violation is alleged. We do hold that the complaint and the findings of the Board should be couched in the foregoing language in order to make the record clear that due process has indeed been afforded to the respondent. Such was not done in this case.

However, such is not the primary grounds of reversal. As we review the record, the Board found against appellant upon five allegations of misconduct pertaining to two patients and upon four allegations pertaining to third patient, a total of fourteen separate allegations. We have struck down all but two of them, those remaining being the alleged recordkeeping violations pertaining to patients McKay and Schultz. Failure to maintain adequate records is obviously a lesser violation than the improper administration of drugs. The Board assessed only one punishment upon the fourteen counts found against appellant. We cannot assume that it would have imposed the same punishment had it known that the more serious twelve of the fourteen would be held void. For us to affirm the entire punishment on the basis of the recordkeeping omissions would deprive appellant of those due process fundamentals which must be observed

in professional license suspension and revocation proceedings. On authority of the Administrative Procedure Act, we reverse the findings of failure to record certain prescriptions of narcotic drugs to patients McKay and Schultz on the dental records pertaining to such patients. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a (e) (5), (6) (Vernon Supp. 1985). Such allegations of professional misconduct are remanded to the Texas State Board of Dental Examiners for further proceedings consistent herewith.[5]

---

5. The dissent has gone to some length to labor the obvious. Of course, this appeal is governed by the substantial evidence rule and the agency decision must stand if reasonable minds could have reached a similar conclusion. *Dotson v. Texas Board of Medical Examiners*, 612 S.W.2d 921, 922 (Tex. 1981). The question remains: Substantial evidence of what?

Obviously, substantial evidence that Percodan contains a narcotic substance would be insufficient without evidence that the drug was, in fact, prescribed or administered. Neither would mere evidence, however substantial, that the drug was prescribed in some amount to some patient suffice. The medication is widely acknowledged as efficacious. The record must contain evidence, substantial in form, that the drug was not only administered but mal-administered. Without substantial evidence of mal-administration, the prosecution founders.

The qualifications of expert witness Jeske are acknowledged as impressive. However, his testimony was all subjective; he repeatedly attached the limiting phrase "in my opinion" to his testimony; he testified as to the manner in which he personally would have treated the patients. The fact that these patients did not receive the treatment that a renowned expert would have given proves nothing; the substantial evidence rule was not satisfied thereby. Discipline may not be imposed for failure to follow the highest standards of the profession; such a test is no test at all for reason that instances can be developed whereby any license could be held guilty of misconduct. Discipline is not imposed for the failure to achieve high standards; it is imposed for the failure to observe minimum standards.

Particularly in view of the fact that none of the patients was examined or interviewed, the testimony of the expert witness Dr. Jeske, in order to be actionable, had to declare that no reasonably competent practitioner similarly situated would have treated these

REVERSED and RENDERED in part; REVERSED and REMANDED in part.

/s/ CHARLES BEN HOWELL
Charles Ben Howell
Justice

PUBLISH

86-00189.F

ENOCH, C.J., and WHITHAM, DEVANY, MCCLUNG, ROWE, BAKER and THOMAS, JJ., join in the opinion of the Court.

MCCRAW, J., dissents with opinion, in which STEPHENS, STEWART and LAGARDE, JJ., join.

HECHT, J., did not participate in the decision of the case.

---

patients in the manner shown by appellant's records. Lacking such testimony, there was no substantial evidence of intolerable conduct. At most, there was no more than substantial evidence of a failure to observe high standards. Such evidence failed to show actionable misconduct.

The expert further acknowledged, both on direct and cross-examination that he was giving only his opinion and that his opinion must be qualified by the fact that he never saw the patients. A dichotomy as to whether the patients received treatment of optimal quality does not meet the test. The substantial evidence rule is not satisfied without proof of professional misconduct clearly rising to the level of negligence, incompetence or wilful misconduct. The subjective nature of the testimony before us distinguishes this case from *Balla v. Texas Board of Medical Examiners*, 693 S.W.2d 715, 716 (Tex. App.—Dallas, writ ref'd n.r.e.) (physician prescribing weight-reduction drugs without ever seeing patients). The *Balla* expert testified that the procedure employed "would not be accepted medical practice." The dissent has made no effort to distill any such evidence from this record. Without substantial evidence to such effect, the charges against appellant Sizemore must fail. *Dotson*, 612 S.W.2d at 923 (suspension reversed where legitimate prescription drugs were prescribed in an allegedly non-therapeutic manner).

APPENDIX H

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00189-CV

CHARLES SIZEMORE, D.D.S.,
Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Appellee.

JUDGMENT

In accordance with this Court's opinion of this date, the district court's judgment affirming sanctions against appellant Charles W. Sizemore, D.D.S. is REVERSED. As more fully set forth in this Court's opinion, this cause is RENDERED in part and is, in part REMANDED to the Texas State Board of Dental Examiners for further proceedings consistent with this opinion. It is ORDERED that appellant Charles W. Sizemore, D.D.S. recover his costs of this appeal from appellee Texas State Board of Dental Examiners. The clerk of the district court is directed to release to appellant Charles Sizemore, D.D.S., the cash deposit in lieu of cost bond.

December 28, 1987.

/s/ CHARLES BEN HOWELL
Charles Ben Howell
Justice

86-00189.J

APPENDIX I

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00189-CV

CHARLES SIZEMORE, D.D.S.,
Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Appellee.

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC
DISSENTING OPINION BY JUSTICE McCRAW
DECEMBER 28, 1987

I respectfully dissent. The majority has misapplied the proper standard of review to be used by the court hearing an appeal from the revocation of a professional license. After a review of the statement of facts and application of the appellate review standard, I must conclude that the rulings of the Texas State Board of Dental Examiners and the 95th District Court should be affirmed.

The Examining Board reached three conclusions in support of their order revoking Sizemore's license: (1) Sizemore prescribed controlled substances that were not necessary or required in the practice of dentistry and the prescription use would promote and further addiction in

violation of Texas Revised Civil Statute article 4551h;[1] (2) Sizemore exhibited dishonorable conduct by grossly over-prescribing narcotic drugs in violation of article 4549; and (3) Sizemore failed to make the prescription of narcotic drugs a part of his patient's dental records.

Hearings and the appeal from hearings on disciplinary actions against dentists is governed by article 6252-13a, the Administrative Procedure and Texas Register Act. TEX. CIV. STAT. ANN. art. 4549, § 4(b) (Vernon Supp. 1987). The scope of judicial review is defined in article 6252-13a, sec. 19(e):

> The scope of judicial review of agency decisions is as provided by the law under which review is sought. . . . Where the law authorizes review under the substantial evidence rule, or where the law does not define the scope of judicial review, the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced. . . .

The substantial evidence test is applicable in the present case. The test is set out in *Dotson v. Texas Board of Medical Examiners,* 612 S.W.2d 921, 922 (Tex. 1981):

> The correct substantial evidence rule test is whether the evidence as a whole is such that reasonable minds *could have* reached the conclusion that the agency must have reached in order to justify its action.

---

1. All references are to Texas Revised Civil Statutes, unless otherwise noted.

(Emphasis added). This test has been used consistently in Texas courts. *See Imperial American Resources Fund v. Railroad Commission of Texas*, 557 S.W.2d 280, 286 (Tex. 1977); *Balla v. Texas State Board of Medical Examiners*, 693 S.W.2d 715, 716 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Kelley v. Texas Real Estate Commission*, 671 S.W.2d 936, 939 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Wood v. Texas State Board of Medical Examiners*, 615 S.W.2d 942, 943 (Tex. Civ. App.—Fort Worth 1981, no writ); *Thompson v. Texas Board of Medical Examiners*, 570 S.W.2d 123, 130 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *Korndorffer v. Texas State Board of Medical Examiners*, 448 S.W.2d 819, 823 (Tex. Civ. App.—Houston [14th Dist.]), *aff'd in part, reversed in part*, 460 S.W.2d 879 (Tex. 1970). The examining board's order is deemed prima facie valid. *Imperial*, 557 S.W.2d 283; *Kelley*, 671 S.W.2d at 939; *Korndorffer*, 448 S.W.2d at 823. The burden of proof is upon the complaining parties to show an *absence* of substantial evidence and that the orders are unreasonable and unjust. *Imperial*, 557 S.W. 2d 283; *see Kelley*, 671 S.W.2d at 939; *Korndorffer*, 448 S.W.2d at 823. When substantial evidence supports the board's decision, article 6253-13a, section 19(e) prohibits the reviewing court from substituting its judgment for that of the agency, even though the court may have "struck a different balance." *Kelley*, 671 S.W.2d at 939; *see Wood*, 615 S.W.2d at 943.

This court must review the entire record to determine if the Board's order is reasonably supported by substantial evidence. Dr. Arthur Jeske, an associate professor of phramacology and restorative dentistry at the University of Texas dental branch in Houston testified for the Board.

Jeske has a Ph.D. in pharmacology, a D.M.D. degree, and has published several papers. He recently co-authored a textbook entitled *Pharmacological Therapeutics in Dentistry*. His expertise was not challenged. Dr. Jeske testified that Percodan, a chemical relative of morphine, is a strong narcotic analgesic that relieves pain centrally. Percodan has an addictive quality and creates physical and psychological dependence by producing a state of euphoria in the user. Dr. Jeske stated that "if given in sufficient quantity for sufficient time, [Percodan use] can result in dependence of the patient psychologically to maintain a state of well-being." Dr. Jeske evaluated the use of Percodan by a patient with temporal mandibular joint pain (TMJ). Dr. Jeske stated that the use of Percodan is not normal in the treatment of TMJ. It is usually treated with a combination of physical measures and occasional use of pharmacological measures, such as the use of muscle relaxants or anti-inflammatory analgesics. Percodan is not an anti-inflammatory analgesic.

The TMJ patient's prescriptions for Percodan commenced on September 10, 1981, through August 23, 1982. In Dr. Jeske testified "with a reasonable degree of medical certainty" that Sizemore prescribed controlled substances that were not necessary or required. He was especially impressed by the fact that Sizemore started the TMJ patient on Percodan in September and allowed two months to elapse during which time further prescriptions were issued and "no definitive dental therapy was performed to alleviate the problem." Sizemore himself admitted there was a problem with the treatment of the TMJ patient. The patient was given additional prescriptions for Percodan from February 28 through June 2, but received no treatment because he allegedly did

not have time for the procedures. Sizemore admtited that he could have demanded that the patient come in to the office and suspend issuance of the prescriptions and "probably should have." He further admitted that "it's obvious that my judgment was not so good [in failing to demand that the patient have treatment]." Sizemore realized that he "may have been used by this person." This patient received 382 pills.

Another of Sizemore's patients had upper-anterior pain in his teeth. Sizemore gave the patient a prescription for Percodan and antibiotics. This regiment was continued for two months before the teeth were extracted. The patient received 121 tablets in this two month period. Dr. Jeske testified that the initial prescriptions may have been justified, but that two months was a "fairly long time" to maintain a patient on pain control and antibiotic. Dr. Jeske stated that the Percodan was probably unnecessary or not required after the first two weeks of therapy. Five days after the painful teeth were removed, the patient was again placed on Percodan and antibiotic for an additional two month period for a problem "of endodontic origin." Dr. Jeske stated that in his opinion the prescriptions became unnecessary or were not required after twenty-four days.

A third patient received prescriptions for Percodan on April 27, May 9, May 13, May 18, June 2 and June 16. No antibiotic was used in conjunction with the prescription. On June 2, amalgam restorations were performed. Dr. Jeske stated that in his opinion, the Percodan prescribed on May 9, 13, and 18 were not necessary or required. In five and one-half months this patient received 220 pills.

Sizemore admits that he failed to properly keep complete records on his patients. There is no evidence presented to controvert the fact that Sizemore did not record all the prescriptions he issued to his patients.

Upon a proper review of all the evidence, I would hold that Sizemore has not met his burden to prove the absence of substantial evidence. The prima facie presumption that the Board's order is valid has not been rebutted. Reasonable minds *could* have reached the conclusions that the Board reached. I would affirm the judgment of the trial court and the orders of the Board.

/s/ JOHN L. McCRAW, JR.
John L. McCraw, Jr.
Justice

PUBLISH

TEX. R APP. P. 90

86-00189.DF/tg

APPENDIX J

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00189-CV

CHARLES SIZEMORE, D.D.S.,
Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Appellee.

JUDGMENT

In accordance with this Court's opinion of this date, the district court's judgment affirming sanctions against appellant Charles W. Sizemore, D.D.S. is REVERSED. As more fully set forth in this Court's opinion, this cause is RENDERED in part and is, in part REMANDED to the Texas State Board of Dental Examiners for further proceedings consistent with this opinion. It is ORDERED that appellant Charles W. Sizemore, D.D.S. recover his costs of this appeal from appellee Texas State Board of Dental Examiners. The clerk of the district court is directed to release to appellant Charles Sizemore, D.D.S., the cash deposit in lieu of cost bond.

December 28, 1987.

/s/ CHARLES BEN HOWELL
Charles Ben Howell
Justice

86-00189.J

APPENDIX K

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 05-86-00189-CV

CHARLES W. SIZEMORE, D.D.S.,
Appellant,

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Appellee.

BEFORE THE COURT EN BANC[1]

ORDER

The January 19, 1988 amended motion for rehearing of appellee the Texas State Board of Dental Examiners is OVERRULED.

March 10, 1988

/s/ CHARLES BEN HOWELL
Charles Ben Howell
Justice

Justices Stephens, Stewart, Lagarde, and Kinkeade dissenting.

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1. The Honorable Nathan L. Hecht, Justice, did not participate in this decision.

The Honorable John L. McCraw, Jr., Justice, having resigned effective December 28, 1987, did not participate in this rehearing.

The Honorable Ed Kinkeade, Justice, participated in this cause on rehearing in succession to the Honorable John L. McCraw, Jr., Justice.

APPENDIX L

THE STATE OF TEXAS

To the District Court of Dallas County, Greeting:

Before our Supreme Court on the 22nd day of June A.D. 1988, the Cause, upon writ of error, to revise or reverse your judgment between TEXAS STATE BOARD OF DENTAL EXAMINERS v. CHARLES W. SIZEMORE, D.D.S., No. C-7369 in the Supreme Court of Texas. No. 84-8575-D in the District Court of Dallas (95th) County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"This cause was heard on writ of error from the Court of Appeals for the Fifth District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

"It is the opinion of the court (Chief Justice Thomas R. Phillips, author) there is error in the judgment of the court of appeals which reversed the trial court judgment. The trial court upheld the Board's decision revoking Sizemore's certificate to prescribe narcotics for two years and suspending his license for five years (probated to 120 days).

"In accordance with the opinion of this court, it is ordered that:

1) because the court of appeals erred in both formulation and application of the substantial evidence test, the judgment of the court of appeals is reversed.

2) The judgment of the trial court is affirmed.

3) Charles W. Sizemore, DDS, shall pay the costs in this court and the court of appeals.

4) Texas State Board of Dental Examiners shall recover its costs in those courts from Charles W. Sizemore, DDS.

"A copy of this judgment shall be certified to the District Court of Dallas County, Texas for observance."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Honorable THOMAS R. PHILLIPS, Chief Justice of our said Supreme Court, with the seal thereof annexed, at the City of Austin, this the 12th day of December A.D. 1988.

MARY M. WAKEFIELD
Clerk

By /s/ PEGGY LITTLEFIELD
Peggy Littlefield
Chief Deputy

APPENDIX M

IN THE SUPREME COURT OF TEXAS

C-7369

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

CHARLES W. SIZEMORE, DDS,
Respondent.

FROM DALLAS COUNTY
FIFTH DISTRICT

OPINION

This is an appeal by a dentist from an order by the Texas State Board of Dental Examiners suspending his license for five years, all but 120 days of which were probated, and revoking his certificate to prescribe narcotics for a period of at least two years. The trial court upheld the Board's decision. With four justices dissenting, the court of appeals, sitting en banc, reversed the judgment of the trial court, holding that the revocation and suspension were not supported by substantial evidence. 747 S.W.2d 389. Because we conclude that the majority of the court of appeals erred in both its formulation and application of the substantial evidence test, we reverse the judgment of that court and affirm the decision of the district court.

The Texas State Board of Dental Examiners conducted a hearing based on alleged violations by Dr. Charles W.

Sizemore of the Dental Practices Act, TEX. REV. CIV. STAT. art. 4543 *et seq.*, and of certain rules of the Board Following the hearing, the Board found that Dr. Sizemore prescribed Percodan[1] and Tylox,[2] in excess of generally accepted dosages for dental treatment to three of his patients, where the prescription and use of such would promote and further addiction. The Board also found that Dr. Sizemore failed to enter the narcotic drug prescriptions in the dental records of two of the patients on nineteen separate occasions.

Hearings and the appeal from hearings on disciplinary actions against dentists are governed by the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. art. 6252-13a. The scope of judicial review under the Act is set forth as follows:

> The scope of judicial review of agency decisions is as provided by the law under which review is sought. . . . Where the law authorizes review under the substantial evidence rule, . . . the court may not

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1. Percodan is a Schedule II narcotic and is a trademark product of DuPont Pharmaceuticals, Inc. *Physician's Desk Reference* 409, 931 (42d ed. 1988). It is a chemical relative of morphine, retrieved from the opium alkaloid, thebaine. It is a strong narcotic analgesic that relieves pain centrally. It produces pharmacologic actions equivalent to those of morphine, including sedation, drowsiness, suppression of reflexes, nausea, vomiting, respiratory repression, and physical and psychological dependence.

2. Tylox is also a Schedule II narcotic and is a trademark product of McNeil Laboratories. Its active ingredients are the common pain relief medicine acetaminophen and the drug oxycodone, which is derived from the opium alkaloid, thebaine. Oxycodone is qualitatively similar to morphine. Its principal therapeutic values are for pain relief and sedation. The drug can produce drug dependence similar to morphine. Pyschic dependence, physical dependence, and tolerance may develop upon repeated administration. *Physician's Desk Reference* 417, 1249 (42d ed. 1988).

> substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the case for proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole. . . .

TEX. REV. CIV. STAT. art. 6252-13a, § 19(e).

The substantial evidence test is applicable to cases involving judicial review of decisions of the Board of Dental Examniers. TEX. REV. CIV. STAT. art. 4548h, § 3(e). The test, as stated many times by this court, is whether the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *E.g.*, *Dotson v. Texas Bd. of Medical Examiners*, 612 S.W.2d 921, 922 (Tex. 1981); *Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 79-80, 161 S.W.2d 1022, 1029 (1942). In determining whether there is substantial evidence, the reviewing court may not substitute its judgment for the Board's, but must consider only the record upon which the decision is based. *Railroad Comm'n v. Entex, Inc.*, 599 S.W.2d 292, 298 (Tex. 1980). The burden is on the complaining party to demonstrate an absence of substantial evidence. *Auto Convoy Co. v. Railroad Comm'n*, 507 S.W.2d 718, 722 (Tex. 1974).

In reversing the trial court, however, the court of appeals disregarded the traditional formulation of the

substantial evidence test, purportedly on constitutional grounds. The court concluded that for revocation of a license to satisfy due process, there must be "proof of conduct injurious to the public welfare; proof . . . of negligence, incompetence, or wilful misconduct." 747 S.W.2d at 397. Since the Board's action was "punitive in effect" and a "quasi-criminal" proceeding, the court of appeals also held that "evidence of conduct injurious to the public welfare must be substantial" in order to uphold the order.

These holdings are in error. Due process concerns place no such restraints on the right of the state, in the exercise of its police power, to regulate the licensing of dentists. "That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary and to that end may require licenses and establish supervision by an administrative board is not open to dispute." *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611 (1935).

Moreover, substantial evidence review does not permit the court of appeals to substitute its own judgment for that of the Board. "The reviewing court is concerned only with the *reasonableness* of the administrative order, not its *correctness*." *Firemen's and Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984) (emphasis added). Section 19(e) of the APTRA clearly forbids the court from usurping the agency's adjudicative authority even though the court may have struck a different balance. *Gerst v. Goldsbury*, 434 S.W. 2d 665, 667 (Tex. 1968).

Thus, we are presented solely with the question of whether substantial evidence exists in the record to sup-

port the Board's action. *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984); *Imperial American Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 286 (Tex. 1977). Under this test, we find that some reasonable basis exists for the Board's action. *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966).

In its first two conclusions of law, the Board found that Dr. Sizemore (1) improperly prescribed controlled substances not necessary or required in the practice of dentistry, or where such would promote addiction, TEX. REV. CIV. STAT. art. 4551h; and (2) grossly over-prescribed narcotic drugs. TEX. REV. CIV. STAT. art. 4549, § 2(c).[3] We hold that these findings are supported by substantial evidence.

The Board's findings of fact related to Dr. Sizemore's treatment of three patients: Danny McKay, Roxanne Sabato, and Kenneth Cook. Dr. Arthur Jeske, an associate professor of pharmocology and restorative dentistry at the University of Texas at Houston, provided expert testimony for the Board.

At the hearing before the Board, Dr. Sizemore admitted that he prescribed 280 capsules of Percodan to Danny McKay over a 12-month period. McKay received the prescriptions for complaints related to temporal mandibular joint (TMJ) pain. Dr. Jeske testified that the dosages given were in excess of generally accepted dosages for treatment of pain, particularly when "no definitive

3. This is the section given in the Board Order and cited to in the opinion below. The correct reference should be to TEX. REV. CIV. STAT. art. 4549, § 3(c). The confusion apparently results from an unclear numbering system in an earlier version of the statute.

dental therapy was performed to alleviate the problem." During the 12-month period, Dr. Sizemore only sought to treat the TMJ condition twice. Admitting that McKay received no dental treatment for over four months because McKay had no time for the necessary procedures, Dr. Sizemore concluded that his judgment "was not so good" and that he "may have been used by [McKay]." Even on the two occasions when Dr. Sizemore did perform some sort of treatment, Dr. Jeske testified that the prescriptions of Percodan were both unnecessary and addicitve.

Dr. Sizemore also admitted to prescribing a total of 220 tablets of Percodan and Tylox to Roxanne Sabato, who was being treated for an infection. Percodan contains aspirin, to which Sabato is allergic, and Dr. Sizemore admitted to overlooking this allergy in writing the prescriptions. On six separate occasions, Dr. Sizemore wrote prescriptions for Percodan that were not accompanied by prescriptions for antibiotic. Dr. Jeske testified that at least three of these six prescriptions were unnecessary, and that the generally accepted duration of Percodan treatment for severe pain of the type Sabato experienced would have been five days.

Finally, Dr. Sizemore admitted to prescribing a total of 382 Percodan capsules to Kenneth Cook over a six-month period. Cook was suffering from upper-anterior pain in his teeth. For two months, Dr. Sizemore prescribed Percodan and antibiotics prior to extracting the problem teeth. Dr. Jeske testified that prescriptions of Percodan were neither necessary nor required after the first two weeks of antibiotic therapy. Following extraction of the first problem teeth, Cook again reported tooth pain and was again placed on a regimen of antibiotics

and Percodan. Dr. Jeske testified that two weeks of treatment with Percodan was justified, but that the prescriptions written after that time were no longer necessary or justified. Dr. Sizemore himself admitted that he "would not have continued to prescribe" the Percodan had he "noticed how much he was giving." According to Dr. Jeske, prescriptions of Percodan over the period of time Cook recevied them could promote or further addiction.

Taken together, this evidence provides a reasonable basis for the Board's first two conclusions of law. *See Texas Health Facilities v. Charter Medical-Dallas*, 665 S.W.2d at 452.

The Board also concluded that Dr. Sizemore violated TEX. REV. CIV. STAT. art. 4549, § 3(j) by violating Board Rule No. 382.19.15.004, 22 TEX. ADMIN. CODE § 109.-144(c) (1986), in that he failed to make the prescription of narcotic drugs a part of his patients' dental records. According to the undisputed evidence, Dr. Sizemore made only two entries on McKay's records regarding prescriptions of a narcotic drug and failed to note four such prescriptions on Sabato's records. This undisputed evidence provides a reasonable basis for the Board's conclusion.

We, therefore, hold that the evidence as a whole was such that reasonable minds could have reached the conclusions that the Board must have reached in order to justify its action. We reverse the judgment of the court of appeals and affirm the decision of the district court upholding the order of the Board.

THOMAS R. PHILLIPS
Chief Justice

OPINION DELIVERED: June 22, 1988

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1584

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

* * * *

CHARLES W. SIZEMORE, D.D.S.,
Petitioner

V.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

* * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * * *

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ARE THE DICTATES OF DUE PROCESS SATISFIED IN A LICENSEE'S DISCIPLINARY PROCEEDINGS WHERE THE EVIDENCE IN THE RECORD AS A WHOLE IS SUCH THAT REASONABLE MINDS COULD HAVE REACHED THE CONCLUSIONS THE AGENCY MUST HAVE REACHED IN ORDER TO JUSTIFY ITS ACTIONS?..... 4

QUESTION 2

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NO. 88-1584

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

* * * *

CHARLES W. SIZEMORE, D.D.S.,
Petitioner

V.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

* * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * * *

To the Honorable Members of the Supreme Court of the United States:

The Texas State Board of Dental Examiners, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The Texas Supreme Court entered an opinion June 22, 1988, and, after denying Petitioner's Motion for Rehearing on November 23, 1988, issued its mandate on December 12, 1988. The June 22,

1988, opinion is reported at 759 S.W.2d 114 (Tex. 1988) (Pet. App. M, PP. 56a). The opinion of the Court of Appeals, Fifth Supreme Judicial District, Dallas is reported at 747 S.W.2d 389 (Tex. App.--Dallas 1987) (Pet App. G-K, PP. 27a-53a). The district court opinion and judgment is not reported but can be found as Petitioner's Appendices D, E, and F. PP. 19a-26a.

STATEMENT CONCERNING JURISDICTION

This is a civil appeal from the highest court of the State of Texas. The Supreme Court of Texas rendered its judgment on June 22, 1988, and overruled Petitioner's Motion for Rehearing on November 23, 1988 (Pet. App. A, PP. 1a). The Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Section 1257(3).

STATUTES INVOLVED

TEX.REV.CIV.STAT.ANN. art. 4549, Sections 3(c), 3(i), 3(j) and 4(b); TEX.REV.CIV.STAT. ANN. art. 4551h; and TEX.REV.CIV.STAT.ANN. art. 6252-13a, Section 19 govern the suspension of Petitioner's dental license.

SUMMARY OF THE CASE

In response to Department of Public Safety concerns about controlled substance prescriptions being written by Dr. Sizemore, the Texas State Board of Dental Examiners (the Board) investigated the nature and purpose of several unusual prescriptions for Percodan. The Board then initiated a complaint against Sizemore for prescribing drugs which were not necessary or required in the practice of dentistry; for dishonorable conduct in grossly over-prescribing Percodan to three of his patients; and for failing to

note the prescription of over 800 dosages of Percodan in his patients' records.

At the administrative hearing, the Board received corroborative evidence regarding the allegations in the form of admissions by Sizemore, dental records, original prescriptions for Percodan, DPS triplicate prescription records, and expert testimony. The expert, Dr. Arthur H. Jeske, who is an associate professor of pharmacology and restorative dentistry, testified that the Percodan prescriptions were neither necessary nor required and could promote and/or further addiction of the patients involved. Dr. Jeske never examined the patients in question, but based his expert opinion on a review of the patients' dental records and his knowledge of dentistry and pharmacy, including learned treatises.

Upon the conclusion of the evidence, the Board found the allegations true and suspended Sizemore's dental license for five years with all but 120 days probated upon condition that Sizemore surrender his DEA controlled substance certificate. Sizemore appealed the decision to the 95th Judicial District Court of Dallas County, Texas, which affirmed the Board's suspension as being supported by substantial evidence in the record as a whole in that reasonable minds could have reached the conclusion the Board must have reached in order to justify its conclusion.

Thereafter, Sizemore appealed the trial court's judgment to the Fifth Supreme Judicial District Court of Appeals in Dallas, Texas, which reversed the Board's order, in part, on the basis of no substantial evidence to support 12 of the allegations, and which remanded the case, in part, for reassessment of the evidence and punishment on the 2 remaining allegations. After its Motion for

Rehearing was overruled, the Board filed an Application for Writ of Error with the Texas Supreme Court. The Texas Supreme Court overturned the intermediate appellate court's decision and affirmed the Board's original suspension of Sizemore's dental license. Once that court overruled his motion for rehearing and issued its mandate, Sizemore petitioned this Court for writ of certiorari.

REASONS WHY PETITION FOR WRIT SHOULD NOT BE GRANTED

The Texas Supreme Court properly held that the evidence before the Board provided a reasonable basis for the suspension of Petitioner's dental license and that the substantial evidence rule governed judicial review of the Board's disciplinary action.

STATEMENT OF THE CASE

QUESTION 1

ARE THE DICTATES OF DUE PROCESS SATISFIED IN A LICENSEE'S DISCIPLINARY PROCEEDINGS WHERE THE EVIDENCE IN THE RECORD AS A WHOLE IS SUCH THAT REASONABLE MINDS COULD HAVE REACHED THE CONCLUSIONS THE AGENCY MUST HAVE REACHED IN ORDER TO JUSTIFY ITS ACTIONS?

"The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based." *Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1942). An administrative agency's findings of fact in a contested case establish the existence of those factual predicates which invoke applicable rules of law and lay the foundation upon

which those rules operate. In the context of judicial review of contested cases before an administrative tribunal, however, the agency's fact findings enable a reviewing court to know the grounds upon which the agency applied rules of law forming the basis of its decision. *Id.* at 87. In other words, the reviewing court must be able to understand the basis for the agency's decision. *United States v. Chicago, M.St.P. and P.R. Co.*, 294 U.S. 499, 504-05 (1935); *Securities and Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). The findings and orders of the Respondent Board are such that this Court can easily ascertain whether the decision to suspend Petitioner's dental license is reasonably supported by the evidence in the record as a whole. (Pet App. C, PP. 12a-18a).

The Texas Supreme Court observed, in an opinion by Chief Justice Thomas R. Phillips (Pet. App. M, PP. 58a):

> The substantial evidence test is applicable to cases involving judicial review of decisions of the Board of Dental Examiners. TEX.REV.CIV.STAT.ANN. art. 4548h, § 3(e). The test, as stated many times by this Court, is whether the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *E.g., Dotson v. Texas Bd. of Medical Examiners*, 612 S.W.2d 921, 922 (Tex. 1981); *Railroad Comm'n v. Shell Oil Co.*, 161 S.W.2d 1022, 1029 (1942). In determining whether there is substantial evidence, the reviewing court may not substitute its judgment for the Board's, but must consider only the record upon which the decision is based. *Railroad Comm'n v. Entex, Inc.*, 599

> S.W.2d 292, 298 (Tex. 1980). The burden is on the complaining party to demonstrate an absence of substantial evidence. *Auto Convoy Co. v. Railroad Comm'n*, 507 S.W.2d 718, 722 (Tex. 1974).

See TEX.REV.CIV.STAT.ANN. art. 6252-13a, Section 19(e). The Court then proceeded to review the administrative record to determine whether substantial evidence existed to support the Board's decision. (Pet. App. M, PP. 60a-62a).

The substantial evidence test is the standard employed by federal courts sitting in review of a federal agency's decision. In *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529, 1539-40 (11th Cir. 1985), Circuit Judge Tjoflat penned:

> In reviewing administrative fact findings to determine whether they are supported by substantial evidence, we must look at the record in its entirety... . *NLRB v. Southern Florida Hotel and Motel Ass'n*, 751 F.2d 1571, 1579 (11th Cir. 1985) quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence supporting the agency's findings exists, if the record reveals "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Universal Camera*, 340 U.S. at 477; *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 337 (5th Cir. 1980); *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 970 (D.C. Cir. 1979)(construing 49 U.S.C. App. § 1486(e)). "[We] must decide only whether the agency made a

> reasonable finding... ." *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d at 338. (Parallel citations omitted).

See also Wilbanks v. Secretary of Health and Human Serv., 847 F.2d 301 (6th Cir. 1988). He further reasoned that deference must be given to the agency's fact findings when the evidence may fairly support two conflicting views. *City of Pompano Beach*, 774 F.2d at 1540, *citing Southern Florida Hotel*, 751 F.2d at 1579 (quoting *Universal Camera*, 340 U.S. at 488).

The reviewing court is forbidden "...from usurping the agency's adjudicative authority even though the court may have struck a different balance." (Pet. App. M, PP. 59a). *See also Id.; City of Galveston v. United States*, 257 F.Supp. 243, 245-46 (1966), *aff'd*, 386 U.S. 269 (1967); *Holley v. Seminole County School Dist.*, 755 F.2d 1492, 1499-1500 n. 5 (1985). In *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), this Court observed, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *See also Illinois Cent. R. Co., et al. v. Norfolk and W. Ry. Co.*, 385 U.S. 57, 67 (1966). It is the triers of fact who have the duty to resolve those conflicts. *Richardson v. Perales*, 402 U.S. 387, 399 (1971). *See also Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. at 88. The evidence before the Board in this case reasonably supported the decision to suspend Petitioner's license.

Petitioner admitted that he prescribed 280 capsules of the narcotic Percodan, a Schedule II controlled substance, to patient McKay on twelve separate occasions. (*See* Petitioner's direct testimony; Transcript of Proceedings, beginning at

P. 95, L. 6). The triplicate prescription records from the Texas Department of Public Safety, admitted into evidence at the hearing (Transcript of Proceedings, P. 4, LL. 18-25), document this finding as do the original prescriptions, which were similarly received by the Board. (Transcript of Proceedings, P. 5, *supra*).

Petitioner admitted and did not contest the finding that he omitted to note the issuance of ten out of twelve prescriptions of Percodan, or 230 capsules, to patient McKay. In addition to Petitioner's admission, the Board relied on the patient records (Transcript of Proceedings, P. 6, *supra*), the original prescriptions (Transcript of Proceedings, P. 5, *supra*), and the Department of Public Safety triplicate prescription records (Transcript of Proceedings, P. 4, *supra*), as evidence to support this finding.

The Board relied on the expert testimony of Dr. Arthur Jeske, who testified "with a reasonable degree of medical certainty" that Petitioner prescribed controlled substances to patient McKay that were not necessary or required. (Transcript of Proceedings, P. 18, L. 11 to P. 19, L. 6). It was Dr. Jeske's testimony which established of record Percodan's properties and effects: that as a chemical relative of morphine it is a strong narcotic analgesic that relieves pain centrally; and that it has an addictive quality, creating both physical and psychological dependence by producing a state of euphoria in the user. (Transcript of Proceedings, P. 13, L. 12 to P. 14, L. 6). In evaluating the use of Percodan for twelve months by patient McKay, who exhibited symptoms of temporal mandibular joint (TMJ) pain, Dr. Jeske stated the treatment of the pain during which time "no definitive dental therapy was performed to alleviate the problem" was in excess of generally accepted

dosages for dental treatment. (Transcript of Proceedings, P. 18, L. 21 to P. 19, L. 1). He further testified that the "quantity was addictive." (Transcript of Proceedings, P. 77, LL. 12-13).

Added to this evidence were the admissions by the Petitioner regarding the problem which arose during his course of treatment of the TMJ-related pain. Petitioner's testimony indicates McKay received no dental treatment for over four months because he allegedly had no time for the necessary procedures. In the words of Justice McCraw's dissenting opinion in the court of appeals (Pet. App. I, P. 50a):

> Sizemore admitted that he could have demanded that the patient come in to the office and suspend issuance of the prescriptions and 'probably should have.' He further admitted that 'it's obvious that my judgment was not so good [in failing to demand that the patient have treatment].' Sizemore realized that he 'may have been used by this person.'

Before the Board, Sizemore testified as follows:

> Q. Well, overall, do you think you did the patient right?
>
> A. I don't think he received the total care that he should have received, but I'm not saying that I wasn't in error of judgment, but at the same time, I'm saying that some of this was due to the patient.
>
> Q. He received the same care that you would want one of your family to receive?

A. No, he didn't, I didn't say that.

(Transcript of Proceedings, P. 283, LL. 3-12).

Q. Well, do you feel like you used good professional judgment or accepted professional judgment?

A. I feel like my judgment may have been in error.

(Transcript of Proceedings, P. 273, LL. 4-8).

As to patient Sabato, Petitioner admitted that he omitted to note the issuance of four out of 13 Percodan prescriptions for the patient. The Board's evidence to support this finding again consisted of the Department of Public Safety's triplicate prescription forms (Transcript of Proceedings, P. 4, *supra*), the original prescriptions for Percodan and Tylox (Transcript of Proceedings, P. 5, *supra*), and Sabato's patient records (Transcript of Proceedings, P. 6, *supra*). Dr. Jeske's testimony supports the finding, too. (Transcript of Proceedings, P. 22, LL. 2-4).

Dr. Jeske testified it was remarkable that patient Sabato received prescriptions for Percodan on April 27, May 9, May 13, May 18, June 2, and June 16 when no antibiotic was used in conjunction with the prescriptions. (Transcript of Proceedings, P. 23, L. 11 to P. 24, L. 11). "With a reasonable degree of medical certainty," Dr. Jeske testified specifically that the Percodan prescriptions of May 9, 13, and 18, 1983, were not necessary or required. (Transcript of Proceedings, P. 24, LL. 6-11). Petitioner gave this patient 13 prescriptions for a total of 220 capsules of Percodan, in spite of the fact that Percodan contains aspirin and the patient had indicated that she was allergic to

aspirin. "It's obvious that I overlooked that on the chart," Sizemore testified. (Transcript of Proceedings, P. 261, LL. 6-7). Moreover, the Department of Public Safety records and original prescriptions established that on March 31, May 9, and June 2, 1983, patient Sabato altered the prescriptions to obtain larger amounts of Percodan than prescribed by Petitioner. (Transcript of Proceedings, P. 4-5, *supra*).

Had Petitioner properly counselled the patient and evaluated the therapeutic purposes of his treatment, Sabato a/k/a Schultz would not have gone to such lengths to support her developing physical and psychological dependency on the drug, Percodan. (Transcript of Proceedings, P. 80, LL. 1-10). Dr. Jeske further testified that given the patient's level and dosage the generally accepted duration of Percodan treatment for severe pain is limited to five days. (Transcript of Proceedings, P. 78, L. 17 to P. 79, L. 3). Indeed, Jeske testified that a patient receiving Schedule II narcotics four times a day for even a day or two demonstrates symptoms of withdrawal upon cessation of treatment. (Transcript of Proceedings, P. 79, LL. 15-21). It is such evidence upon which the Respondent found that such prescriptions were in excess of generally accepted dosages for dental treatment.

Petitioner admitted to prescribing Percodan to a third patient, Kenneth Cook, on 21 separate occasions for a total of 382 capsules. The Board, however, relied on the Department of Public Safety triplicate prescription forms (Transcript of Proceedings, P. 4, *supra*), the patient records (Transcript of Proceedings, P. 6, *supra*), and the original prescriptions (Transcript of Proceedings, P. 5, *supra*) so to find.

Patient Cook had upper-anterior pain in his teeth. For two months, Petitioner prescribed Percodan and antibiotics prior to extracting the problem teeth. Cook received 121 tablets in this two month period. Dr. Jeske testified that although the initial Percodan prescriptions may have been necessary or required, the continued prescribing of Percodan was neither necessary nor required after the first two weeks of therapy. (Transcript of Proceedings, P. 26, L. 11). In evaluating the Petitioner's returning the patient to the Percodan/antibiotic regimen for an additional two month period, Dr. Jeske stated that in his expert opinion the prescriptions were not necessary or required after twenty-four days. (Transcript of Proceedings, P. 26, L. 11 to P. 27, L. 17).

Petitioner admitted as much at the Board hearing:

> **Q.** Okay. Did it ever occur to you in that two-month period [from December 28 to February 24] that 121 tablets of Percodan is excessive for a patient that comes into your office. Did you ever think about how much Percodan you were giving the patient?
>
> **A.** I see now in retrospect and the way it looks on this record, I should probably have noticed, but it did not occur to me or I would not have continued to prescribe it for him.

Based upon its review of this evidence, the Texas Supreme Court properly determined that the Board's suspension of Petitioner's dental license was reasonably supported by the evidence in the record as a whole. Of course, a reviewing court must also assure itself that the agency has not otherwise

acted arbitrarily. *Conservation Law Found. of New England v. Clark*, 590 F.Supp. 1467, 1473 (D. Mass. 1983). "With respect to questions of fact the proper inquiry is whether on the record as a whole the agency could reasonably make the finding that it did." *Id.* at 1474, *citing Pre-Fab Transit Co. v. United States*, 306 F.Supp. 1247, 1250 (D.C. Ill. 1969), *aff'd*, 397 U.S. 40 (1970). In other words, has the agency exercised reasoned discretion? *Id.* at 1473, *citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *accord, e.g., Chaney v. Heckler*, 718 F.2d 1174, 1189 n. 38 (D.C. Cir. 1983); *See also Motor and Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1123 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980) (where the court stated that the agency's administrator's "burden" is the burden of acting reasonably).

Where a matter is committed to agency discretion, the exercise of that discretion should not be disturbed on appeal unless abuse of discretion is shown. *State of Texas v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) *cert. denied*, 469 U.S. 833 (1984) (where the Dental Board did not abuse its discretion in refusing to grant dentist a continuance). *See also Withrow v. Larkin*, 421 U.S. 35, 55 (1975) and *United States v. Morgan*, 313 U.S. 409, 421 (1941). The findings and conclusions of the Board are not "...[s]o out of touch with reality revealed by the whole record as to be arbitrary and capricious. ..." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1187 (6th Cir. 1986), *cert. denied*, 479 U.S. 890 (1986). The decision of the Board is supported by at least the minimum quantum of evidence necessary to satisfy the due process clause. The opinion of the Texas Supreme Court should be affirmed.

QUESTION 2

MAY AN EXPERT WITNESS BASE AN OPINION IN A PARTICULAR CASE ON FACTS OR DATA PERCEIVED BY OR MADE KNOWN TO HIM AT OR BEFORE THE HEARING IF IT IS OF A TYPE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD IN FORMING OPINIONS OR INFERENCES ON THE SUBJECT?

The Texas Supreme Court correctly affirmed the Board's conclusion that Petitioner over prescribed narcotic drugs as being supported by substantial evidence. The expert witness in this case, Dr. Arthur Jeske, is both a dentist and a pharmacist. There is expert testimony in the administrative record that Percodan is a Schedule II controlled substance and that it possesses addictive qualities. (Transcript of Proceedings, PP. 13-14, *supra*). There is expert testimony to the effect that the prescriptions issued were not necessary or required in the treatment of these patients. (Transcript of Proceedings, PP. 18-19, 24, and 26, *supra*). There can be no question that Sizemore intentionally and knowingly wrote the prescriptions in the quantities and amounts found in the Board's decision. The evidence showed, and the Board found, that such intentional prescriptions were excessive, not necessary, and furthered addiction.

Prior to entering its order suspending the license, the Board members received and considered only the competent and material evidence offered during the administrative hearing. *See NLRB v. Burns*, 207 F.2d 434, 436 (8th Cir. 1953) *citing Donnelly Gammert Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1942). The Petitioner, nevertheless, would have this Court impermissibly substitute its evaluation of the expert testimony for that of the Board members. A reviewing court's characterization

of the underlying conduct in question is irrelevant. Notwithstanding Petitioner's assertion, "[s]ome adjudicative facts might very well require expert knowledge or experience to properly evaluate the evidence." *Adams v. Texas State Bd. of Chiropractic Examiners*, 744 S.W.2d 648, 654 (Tex. App.--Austin 1988, no writ). "Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge." *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1138-39 (3rd Cir. 1983).

The majority's reasoning in the Court of Appeals for disregarding the expert testimony before the Board is stunning. Justice Howell, in footnote 5 at page 398, pens:

> The qualifications of expert witness Jeske are acknowledged and impressive. However, his testimony was subjective; he repeatedly attached the limiting phrase "in my opinion" to his testimony... .

Compare DaSilva v. American Brands, Inc., 845 F.2d 356, 361 (1st Cir. 1988) (the use of the terms "my belief" or "could have" is sufficient to support an expert's conclusions and opinions). This Court stated in *NLRB v. Pittsburg S.S. Co.*, 337 U.S. 656, 660 (1949) that the evidence relied on by the agency must itself be incredible, and "carry its own death-wound" in order for the reviewing court to find that a hearing is unfair.

TEX. R. EVID. 703 and 705 are dispositive.

> The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the

> underlying facts or data, unless the Court requires otherwise... .

TEX. R. EVID. 705 (1983). *See also* FED. R. EVID. 703 and 705. "This rule makes no mention of just how much underlying data should be disclosed or the manner in which it should be presented." Wendorf and Schlueter, *Texas Rules of Evidence Manual* (1983), p. 157.

The Petitioner's requirement that expert witnesses in a Dental Board disciplinary proceeding examine the patients of the practitioner under review renders the following evidentiary rule meaningless:

> The facts or data in the particular case upon which an expert bases an opinion or inferences may be perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TEX. R. EVID. 703 (1983); *See also Barefoot v. Estelle*, 463 U.S. 880, 903-05 (1983) (predictions of future dangerousness by a psychiatrist who had never examined the defendant were allowed); *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 402-03 (3rd Cir. 1980); *Moore v. Grantham*, 599 S.W.2d 287, 290 (Tex. 1980); *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180, 186 (Tex. 1972); *Trailways, Inc. and Trailways of Texas, Inc. v. Mendoza*, 745 S.W.2d 63 (Tex. App.--San Antonio 1988, no writ); *Lipsey v. Texas Dep't of Health*, 727 S.W.2d 61, 72 (Tex. App.--Austin 1987, writ ref'd n.r.e.) and *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 330-31 (Tex. Civ.

App.--Austin 1975, no writ). In reality, the Petitioner is objecting to the form of the expert testimony rather than its substance.

It requires no great leap of faith for this Court to find the Board members could have reasonably concluded that Petitioner consequently engaged in dishonorable or unprofessional conduct by "grossly over prescribing ... narcotic drugs, ... or controlled substances." Unless the decision is "so overwhelming ... as to shock the conscience or to show clearly that the conclusion reached was wrong, or was the result of passion, prejudice or improper motive," a reviewing court should not disturb fact-findings based upon "conflicting evidence where there is some evidence to support" the decision. *Trailways, Inc. v. Mendoza*, 745 S.W.2d at 66; *See also Swinney v. Winters*, 532 S.W.2d 396, 406 (Tex. Civ. App.--San Antonio 1975, writ ref'd n.r.e.).

QUESTION 3

DOES THERE EXIST A RATIONAL BASIS FOR THE TEXAS LEGISLATURE TO HAVE PROVIDED FOR DIFFERENT STANDARDS OF JUDICIAL REVIEW FOR DIFFERENT PROFESSIONS WITHOUT DENYING EQUAL PROTECTION?

Texas courts have consistently held that the right to trial by jury does not apply to administrative proceedings generally. *State of Texas v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975), *citing State v. DeSilva*, 145 S.W.2d 230 (Tex. 1912), and *Texas Liquor Control Bd. v. Jones*, 112 S.W.2d 227 (Tex. Civ. App.--Texarkana 1937, no writ). Furthermore, it is clear that judicial appeals from administrative agency decisions may properly be conducted under the substantial evidence rule, which does not include a right to

trial by jury. *Halsell v. Texas Water Comm'n*, 380 S.W.2d 1 (Tex. Civ. App.--Austin 1964, writ ref'd n.r.e.); *Lewis v. Metropolitan Sav. and Loan Ass'n*, 550 S.W.2d 11 (Tex. 1977); *McConnell v. Alamo Heights Indep. School Dist.*, 576 S.W.2d 470 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). *See also McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (due process does not require trial by jury in civil juvenile delinquency proceedings); *Dorsey v. Solomen*, 435 F.Supp. 725, 733 (1977), *citing Doremus v. Farrell*, 407 F.Supp. 509, 516 (D. Neb. 1975) (due process does not require jury trial in civil commitment proceeding).

In the most recent state court opinion on this issue, the Court of Appeals for the Third Supreme Judicial District at Austin has written that the cause of action is 'purely statutory' in that the rights to be enforced and the remedies provided were not known at common law. Simply put, the legislature is only prohibited from abrogating "the right to a jury trial if it existed by statute or under the common law *at the time the Constitution was adopted in 1876*." *Adams*, 744 S.W.2d at 651. Similar reasoning applies to substantial evidence review under the Dental Practice Act. *See also Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400, 405 (Tex. Civ. App.--San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed*, 409 U.S. 1020 (1972) (for authority that trial by jury is not required in a proceeding to review the order of an administrative agency where the substantial evidence rule is the statutory standard of review). In 1978, the Texas Supr[illegible]ourt said, in *Southwestern* [illegible] *v. Publi*[illegible] .W.2d 503, 51[illegible] 1978), [illegible]ational infirmity [illegible]iting judici[illegible]ord taken be[illegible] admini[illegible]- *bama Pub.* [illegible] *Co.*[illegible], [illegible]1 U.S. 341, [illegible]951).

The Texas Constitution contains two separate provisions regarding the right to trial by jury. The first is Article I, Section 15, found in the Bill of Rights of the Constitution; the second is Article V, Section 10, contained in the Judiciary Article. The Bill of Rights provision continues the right to a jury in all actions where the right existed at the time the constitution was adopted. *See Credit Bureau of Laredo*, 530 S.W.2d 288, 291. The present Constitution was adopted in 1876; dentists were specifically exempted from the operation of the 1873 Medical Practice Act in 1907; and the Dental Practice Act was initially enacted by the Acts of 1919, 36th Leg., ch. 31, p. 50. Prior to 1919, there was no requirement for licensure of dentists, and consequently there could be no sanctions imposed against a non-existent license. It follows, therefore, that the Petitioner would not be entitled to a jury trial under the Bill of Rights Jury Article.

The Judiciary Article, Article V, Section 10, provides for jury entitlement in the "trial of all causes." The Texas Supreme Court defines "cause" as a "suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice." *Id.* at 292. The Court points out that not all adversarial proceedings qualify as a "cause" under the Judiciary Article. It is submitted that an administrative disciplinary hearing is not a "cause" as that term has been defined by the Texas Supreme Court, and therefore, Petitioner is not entitled to a jury.

Petitioner now asks this Court to declare unconstitutional the provisions of TEX.REV.CIV.STAT. ANN. art. 6252-13a, Section 19(e), the Administrative Procedure and Texas Register Act (the APTRA) which provide for appeal of administrative orders under the substantial evidence rule. Petitioner argues that because dentists in Texas are

allowed to appeal under the substantial evidence rule while attorneys are allowed to pursue appeals by trial *de novo*, Petitioner, whose appeal comes under the substantial evidence rule, is denied Sixth and Seventh Amendment rights to trial by jury and is denied equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

The question of whether the split system of review constitutes a denial of equal protection has not been directly addressed by the appellate courts of this state. However, it is very clear that the courts have condoned both types of review in upholding administrative review under both the trial *de novo* and substantial evidence rule provisions. *Scott v. Texas State Bd. of Medical Examiners*, 384 S.W.2d 686 (Tex. 1964); *Martinez*, 476 S.W.2d at 405. In Texas there is no right to appeal from an administrative order unless an appeal is statutorily provided or the administrative order adversely affects a vested property right. *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385, 386-87 (Tex. 1967).

It has also been held that where such a property right exists, a licensee's due process rights to an appeal are adequately protected by a substantial evidence review. *Martinez*, 476 S.W.2d at 405. Therefore, the holding in *Martinez* indicates that the legislature may provide for appeal by substantial evidence review without violating due process rights. In *Sherman v. Texas State Bd. of Dental Examiners*, 116 S.W.2d 843, 846 (Tex. Civ. App.--San Antonio 1938, writ ref'd), it was held that although a license to practice was a valuable property right, "it is not such a vested right, in the constitutional sense, that it may not be revoked for good cause, and such revocation is not a taking

of property without due process." *See also State of Texas v. Crank*, 666 S.W.2d 91.

Petitioner's basic contention, however, is that the legislature, in providing that dentists must appeal adverse administrative rulings under the substantial evidence rule while attorneys appeal by trial *de novo*, has violated dentists' right to equal protection. Petitioner has not urged the application of the "strict scrutiny" test, which is inappropriate because professions are not a suspect classification, but instead argues that there is no "rational basis" for the distinction as to manner of appeal. *See Harper v. Lindsay*, 616 F.2d 849, 854 (5th Cir. 1980), *citing Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978). "Equal protection of the law simply means that similarly situated persons receive similar treatment under the law." *Dorsey*, 435 F.Supp. at 734, *citing Reed v. Reed*, 404 U.S. 71, 75 (1971). Here, all dentists are treated the same for purposes of judicial review.

It is well settled that a state may categorize its citizens on the basis of their professions and may make different laws respecting groups so classified. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935); *Tigner v. State of Texas*, 310 U.S. 659 (1940). *See also Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971); *Railroad Comm'n v. Miller*, 434 S.W.2d 670 (Tex. 1968); *Jefco, Inc. v. Lewis*, 520 S.W.2d 915 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.). This Court in *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) recognized that "the equal protection clause of the Fourteenth Amendment does not require states to treat different groups in the same manner. Only unreasonable discriminations are forbidden." Additionally,

> "very wide discretion must be conceded to legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation. ... If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection." *Brown-Foreman Co. v. Kentucky*, 217 U.S. 563 (1910).

Furthermore, "The mere fact that discrimination is made does not necessarily vitiate the classification, and unless there is no substantial basis for the discrimination, there is no warrant for judicial interference." *Dodgen v. Depuglio*, 209 S.W.2d 588, 594 (1948). In determining whether there is any substantial basis for the classification "the test is whether there is any basis for the classification" which could have seemed reasonable to the Legislature." *Miller*, 434 S.W.2d at 673, *citing San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813 (1957). The equal protection clause, moreover, does not require "absolute equality or precisely equal advantages." *Dorsey*, 435 F.Supp. at 735, *citing San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1974).

This Court has held that "statutory discrimination will not be set aside if any statement of facts reasonable may be conceived to justify it..." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Petitioner's burden before this Court is a heavy one. Petitioner must show that there was no conceivable basis upon

which the legislature could have founded its determination to provide for substantial evidence review in some cases while not in others.

The difference in the standard of review between dentists and attorneys stems from the applicability of the Administrative Procedure and Texas Register Act. The APTRA applies to legislative and executive agencies, boards, and commissions, but does not apply to the courts, which are in the judicial branch. *See* TEX.REV.CIV.STAT.ANN.art. 6252-13a Section 3(1). This Court has given great deference to legislative purposes to create a strong presumption of constitutionality. *See City of New Orleans v. Duke*, 427 U.S. 297 (1976); *McGowan*, 366 U.S. at 425-26. Traditionally, this Court has upheld any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. ..." *Allied v. Bowers*, 358 U.S. 522, 530 (1959).

As the highest state judiciary body, the Texas Supreme Court has the "inherent power to regulate the practice of law," State Bar Rules, Preamble, and disciplinary action by the State Bar is subject to the supervisory power of the Texas Supreme Court. Texas State Bar Rules, Article X, § 1. *See also P.U.C. v. Cofer*, 754 S.W.2d 397, 398-99 (Tex. 1979). Since the judiciary is a separate branch of government not subject to the APTRA, the Texas Supreme Court has promulgated its own rules concerning the standard of review in license revocation proceedings of attorneys and has chosen trial *de novo*. Therefore, the different standards of review for dentists and attorneys stems from the fact that the Dental Board is an executive agency subject to APTRA while attorneys are licensed through the Texas Supreme Court, which as the judicial branch is not subject to APTRA.

Finally, on pragmatic rather than constitutional grounds, the Board urges against the striking of the substantial evidence review. Under the provisions of the Administrative Procedure Act, the Board of Dental Examiners and other administrative agencies are held to strict rules of procedure that approximate and occasionally exceed those required of the courts. *See* Judge McGee's dissent in *Lewis v. Metropolitan Sav. and Loan Ass'n*, 550 S.W.2d 11, 16-17 (Tex. 1977). The *de novo* appeal renders worthless the agency record that is required to be so carefully prepared. Therefore, if any change is to be made to equalize the method of judicial review of administrative orders it is the *de novo* rather than the substantial evidence review that should be eliminated. However, in absence of any constitutional deficiencies in the present methods of review, such changes should remain the province of the legislature rather than the courts.

CONCLUSION

Because the law governing the issues raised by Petitioner is well settled, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 24th day of April, 1989, to:

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